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**International criminal courts and the introduction of the Daubert standard as a mode of assessing the psychological impact of warfare on civilians
a comparative perspective**

Solomon, Solon

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**INTERNATIONAL CRIMINAL COURTS AND THE
INTRODUCTION OF THE DAUBERT STANDARD AS A
MODE OF ASSESSING THE PSYCHOLOGICAL IMPACT OF
WARFARE ON CIVILIANS**

A Comparative Perspective

Solon Solomon

A thesis submitted to King's College London Dickson Poon School of Law for
the degree of Doctor of Philosophy

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LIST OF ABBREVIATIONS

ECCC	Extraordinary Chambers in the Courts of Cambodia
ICJ	International Court of Justice
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
EPA	Environmental Protection Agency
PTSD	Post-traumatic Stress Disorder

ACKNOWLEDGMENTS

The current thesis constitutes the culmination of a long journey and I would like to thank a few people for providing insights, comments and feedback on the issues presented therein. First, I would like to thank my supervisors for their illuminating remarks and support. On the same tone, Ilias Bantekas acted in many cases as more than just a supervisory voice, being always happy to provide his insights on the international criminal law aspects of the thesis.

Elements of the issues elaborated in this thesis are drawn from arguments and ideas that have appeared in previous publications of mine in venues like the German Law Journal, the Netherlands Quarterly of Human Rights, the Berkeley Journal of International Law and the EJIL!Talk site. The thesis, updated with material till January 2019, has equally benefited from discussions I have had with colleagues in the realms of my presentations at the University of Cambridge, the University of Geneva, the British Institute of International & Comparative Law, the ANZSIL Annual Conference, the Annual Conference of the Society of Legal Scholars and during my stay as a visiting scholar at the Tel Aviv University Faculty of Law and at the Humboldt-Universität zu Berlin Faculty of Law.

On this account, I thank the Tel Aviv University Cegla Interdisciplinary Center and the Humboldt Law School for the grants they awarded me, enabling my stay in Tel Aviv and Berlin. The research presented in this thesis benefited also from indirect financial support from King's College London in the form of a visiting lectureship for which I would like to thank all the people who trusted me for this endeavour, particularly Professors Andrea Biondi and Takis Tridimas, the former being extremely supportive also regarding the thesis itself. At King's, I met also other members of staff who were highly supportive of my academic endeavours. I would like to thank particularly Professors Eva Pils, Tanya Aplin and David Nelken. Beyond King's, Robert O'Keefe, Ruvy Ziegler, Jean d'Aspremont, Gleider Hernandez, Lutz Oette,

Andreas Philippopoulos-Mihalopoulos and Emma McClean were always there to buttress my academic route.

In Tel Aviv, colleagues offered valuable insights on the general aspects of incidental mental harm in warfare and for this I am indebted. I would like to particularly thank Gabriella Blum, Eliav Lieblich, David Kretzmer, Natalie Davidson, Robbie Sabel, Shachar Eldar and Edo Eshet. My thoughts on the question of incidental mental harm and warfare's psychological impact were further nourished through my discussions with Marco Sassoli and Rob McLaughlin in Geneva and in Australia to both of whom I am grateful for pointing out important issues.

My stay in Humboldt offered me the opportunity to put to academic scrutiny my ideas regarding the application of the Daubert standard beyond the national realms, presenting them inter alia also before a larger audience in a conference the Law School organized. On this, I thank the conference organizers for giving me the opportunity to discuss my work as well as for providing valuable feedback together with the other participants. Furthermore, a dear friend, Christos Lolos, was always there to provide his comments at important stages of the thesis writing.

The thesis would not have been written without the abundant support of my family. Along these lines, I thank my parents, Mordechai and Berta, and my brother, Isaac, for being by my side all these years. This thesis is dedicated to them.

London, January 2019

ABSTRACT

This research project aims to address the oxymoron created by the fact that although the infliction of serious mental harm is an international crime and, as in every crime according to the legality principle that applies in criminal law, all of its elements have to be proven in order for the defendant to be convicted, in the course of warfare, international criminal courts and tribunals convict defendants for the causation of serious mental harm to civilians with no recourse from ad hoc furnished psychological and psychiatric opinions and reports. Rather convictions are made through discussion only of facts or by citing psychological reports for the mental harm incurred in general to the wider affected civilian population. On this account, and taking as a model the Daubert standard which requires a judge to take a stance on issues of scientific or technical expertise by relying only on reliable expert opinions and reports, the current thesis explores whether the particular standard and its reliability precept that originate from the U.S. criminal procedure can be transplanted into international criminal law. This would thereby oblige international judges to relate to civilian mental harm only through ad hoc provided substantiated psychological opinions and reports.

This thesis can be largely seen as informally divided into three thematic units. The first one relates to the international criminal law contour and explores how international criminal courts and tribunals, with no resort to psychological opinions and reports provided ad hoc, reach the conclusion that civilians have suffered mental harm. Underlining the problems such practice creates for the integrity of law, a possible way of introducing the Daubert standard as a general principle, is further explored.

Following this thread of thought, the discussion in the second thematic unit takes place on a domestic law framework and looks at the Daubert standard as a domestic principle that could be possibly transplanted into international criminal law. The analysis begins by

delineating the standard in the U.S. jurisprudence from where it originated, and continues to encompass about twenty different legal orders in coming to underline the need different legal systems point out for issues of expertise to be addressed by the judge on scientifically reliable grounds.

Finally, in the third thematic unit, the thesis returns again to the international contours to discuss and demonstrate that the reluctance of international criminal courts and tribunals to resort to the aid of mental health experts for the assessment of the psychological harm suffered by civilians, is not something that should be seen as related to any structural limitations these courts may face in addressing such psychological opinions and reports.

Chapter 1: *The Question of the Daubert Standard Application in International Criminal Law as a Mode for Assessing Warfare's Psychological Toll on Civilians*

1.1 Introduction

In our era, if anything the 20th century came to teach, it is warfare's heinous face. Two World Wars, extensive loss of life and destruction, war crimes and most notably the Holocaust, came to shake humanity's conscience. Today, the dire consequences of warfare are widely recognized, including its psychological impact both on combatants as well as on civilians.¹ At the same time, the psychological impact of warfare on the latter has been less explored even by mental health scientists.² Echoing this reality, this is the case also with the law. Courts are ready to address the mental harm incurred to that combatants,³ yet, when it comes to civilians, they tend to place their emphasis on physical injury and death rather than on psychological scars. Thus, they either do not address relevant civilians' claims at all,⁴ or they relate to them

¹ For the case of combatants, see Michael Sledge, *SOLDIER DEAD: HOW WE RECOVER, IDENTIFY, BURY & HONOR OUR MILITARY FALLEN*, Columbia University Press, 2005, 261; Kessler et al., Posttraumatic Stress Disorder in the National Comorbidity Survey, 52(12) *Archives of General Psychiatry* 1048 (1995); C. Hoge et al., Combat duty in Iraq and Afghanistan, Mental Health Problems and Barriers to Care, 351(1) *New England J. Medicine* 13 (2004); A.C. Iversen et al., Risk Factors for Post Traumatic Stress Disorder among UK Armed Forces Personnel, 38 *Psychological Medicine* (2008) 511. For civilians see Nathan Stein et al., The Differential Impact of Terrorism on two Israeli Communities, 83(4) *Am. J. Orthopsychiatry* 528 (2013); R. Srinivasa Murthy & Rashmi Lakshminarayana, Mental Health Consequences of War: A Brief Review of Research Findings, 5(1) *World Psychiatry* 25 (2006)

² David Benedek et al, *Disaster Psychiatry: Disasters, Terrorism and War* in KAPLAN AND SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (Benjamin Sadock et al. 9th ed., 2012), Vol. II, 2617; Patrick Palmieri, Daphna Canetti-Nisim, Sandro Galea, Robert Johnson, Stevan Hobfoll, The Psychological Impact of the Israel-Hezbollah War on Jews and Arabs in Israel: The Impact of Risk and Resilience Factors, 67 *Social Science & Medicine* (2008) 1208, 1209 (noting that few studies have examined the impact of war on civilian populations.)

³ See indicatively Landy Sparr, Combat-related PTSD in Military Court: A Diagnosis in search of a Defense, 39 *Int'l. J. Law & Psychiatry* 23 (2015); Danielle Ferguson, Courts Accepting PTSD as criminal defence, Associated Press, 23 July 2018 available at <https://www.apnews.com/ea72fdf856fb4a27aad98e2c74ed2a03>

⁴ See on this Ali Jaber case before the U.S. courts where although the plaintiffs, relatives of civilians killed as a result of the U.S. drone strikes, claimed that the particular U.S. policy contravened the jus in bello proportionality principle due to the incidental fear it caused among the civilian population. The Court did not

without resorting, eclectically or not, to scientific opinions and reports, which, in the end, makes any mental harm-related conclusions look arbitrary.⁵ This is palpably the case with international criminal courts and tribunals, which follow an inconsistent jurisprudential line. Sex-related crimes, for example the crime of rape, induce the calling of psychologists or psychiatrists to assess the victim's psychological status.⁶ This is not the case though for other international crimes where the psychological plight of the civilian victim who is testifying as a witness before the court is described either with no recourse at all from expert opinions or through general citations of the suffering incurred to the affected civilian population.⁷

It is true that acts of warfare wreak havoc and impact adversely on a large number of civilians. By definition, international criminal courts and tribunals come to try the most heinous crimes that are perpetrated on a large-scale, widespread basis and are to be seized with crimes involving many victims. The high numbers of the affected civilians and the inability for many of them to appear and testify before court, does not mean that the judges should negate acknowledging the general mental harm incurred to these civilians *in toto* as a result of a defendant's actions. Courts do consider the larger picture and they buttress their assertions that the defendant's actions have caused mental harm to the affected civilian population in general by discussing in particular the psychological harm suffered by the civilians testifying before them. Yet, exactly because these civilians' testimonies are to serve as the verification ground

address at all these civilians' pleas as far as their mental harm was concerned. On this see regarding the plaintiffs' arguments *Ali Jaber et al. v. United States*, U.S. District Court, District of Columbia, Complaint, Civil Action No.1:15-cv-840 filed on 7 June 2015 at paras.82-83, 85 available at <https://www.courthousenews.com/wp-content/uploads/2016/12/AliJaberComplaint.pdf>. For the judgment see *Ali Jaber et al. v. United States*, U.S. Court of Appeal (D.C. Circuit), 30 June 2017. See also the case of the Kunduz strike where the District Court of Koln in Germany did not address the psychological harm instilled upon the affected civilians. On this see VG Koln, Judgment, 26-K 5534/10, 9 February 2012, para.36

⁵ On this account see for example the European Court of Human Rights awarding non pecuniary damages for the fact that a civilian suffered shock as a result of an aerial attack without substantiating through a scientific opinion provided ad hoc that indeed such grave psychological harm has been inflicted. On this see ECtHR, *Isayeva v. Russia*, App. No.57950/00, Judgment, 24 February 2005, paras.237-240

⁶ On this see Farhad Malekian, *JURISPRUDENCE OF INTERNATIONAL CRIMINAL JUSTICE*, Cambridge Scholars Publishing (2014) 156-157

⁷ See *infra* Chapter 2

on a micro level of the wider mental harm incurred, as this is also portrayed many times in relevant psychiatric reports and studies, the psychological harm of the testifying civilians must be substantiated in a way that it cannot be deemed to be arbitrarily inferred. In that sense, its assessment cannot be grounded on any pronouncements by judges lacking psychiatric expertise, but by mental health experts.

Indeed, the fact that acts of warfare have caused trauma and anguish to the civilians can be many times easily deduced by the acts of warfare that judgments and reports come to describe.⁸ In some cases, it is even sufficient for an international criminal court to stay on such general assertions. For example, during the reparations phase and once the guilt of the defendant has been decided, reference to the harm sustained by the civilians can be more general to the extent that what is at stake is not the exact degree of the harm the civilians sustained but their victimhood status and their eligibility for compensation.⁹ In order for such victimhood status to be awarded it is enough that the individual in question has suffered harm. The level and degree of the sustained harm does not matter.

This is not the case with the role civilian harm plays in the main trial or even in the sentencing phase where the linkage between such harm and the defendant's actions is not used to grant a certain status to the affected civilians and protect their interests but to convict the

⁸ See for example the Schabas-Davis Report, which referred to 'mental traumas' based on how Israeli civilians affected by the Hamas-launched rocket attacks described in their testimonies the fear and other psychological symptoms they experienced (Report of the detailed findings of the Independent Commission of Inquiry established pursuant to Human Rights Council Resolution S-21/1, Human Rights Council, 29th sess., 24 June 2015, para.568). See also the fact that the ICC Prosecutor in the Arrest Warrant issued for Sudan's president, Bashir, proceeded to note that applying force and entering the villages, looting, killing and raping, pro-Bashir forces obliged survivors of these attacks to be forcibly expelled from their homes and on account of this even if physically not sustaining any injuries, these persons internally displaced suffered from 'serious mental harm' because 'the psychological scars to these persons obliged to be distanced from their native land were immense.' (Prosecutor's Application for Warrant of Arrest under article 58 against Omar Hassan Ahmad Al Bashir, Summary of the case, p.p.5-6 available at <https://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>)

⁹On this see the experts' report in the case of Bemba ICC, Annex, Public Redacted Version of Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2, Expert Report on Reparation Presented to Trial Chamber III, International Criminal Court, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, The Hague, 20 November 2017, para.18

defendant and lead to the deprivation of his liberty. With only the causation of ‘serious mental harm’ being an international crime, there the gravity of the incurred harm does matter. It is on this account that the current thesis argues that the sustained psychological harm cannot be assumed but must be proven through resort to scientific reports.

The need for international criminal courts to consider psychological or psychiatric opinions and reports does not mean that courts cannot set their own criteria for what constitutes ‘serious mental harm.’ Nor should these criteria always coincide with the dicta of mental health sciences. Thus, international criminal courts and tribunals have held in the past that ‘serious mental harm’ involves the infliction of strong fear or terror, intimidation or threat constitutes ‘more than a minor or temporary impairment of mental facilities’ and thus should be seen as a causation factor of ‘serious mental harm.’¹⁰ Serious mental harm has been deemed to involve more than ‘a vague state of anxiety’,¹¹ going ‘beyond temporary unhappiness.’ Without having to be permanent or irremediable,¹² in order to be asserted, serious mental harm must nevertheless bear the characteristics of a ‘grave and long disadvantage to a person’s ability to lead a normal and constructive life.’¹³

Equally in the domestic realms, criminal law, both in common law and civil law jurisdictions, does not necessarily mirror the definitions psychiatry or psychology have endorsed for mental disorders. This is portrayed in the case where law comes to discuss when a person is to be found not mentally stable. In common law, the concept of ‘disease of the

¹⁰ ICTR, Prosecutor v. Seromba, ICTR-2001-66-A, Appeals Chamber, Judgment, March 12, 2008, para.45-47; ICTR, Prosecutor v. Kajelijeli, ICTR-98-44A-T, Trial Chamber, Judgment, December 1, 2003, para.815; ICTR, Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, Trial Chamber, Judgment, May 21, 1999, para.110; ICTR, Prosecutor v. Semanza, ICTR-97-20-T, Trial Chamber, Judgment, May 15, 2003, para.321. On this account see also the relevant similar jurisprudence of the ICTY in ICTY, Prosecutor v. Blagojevic, IT-02-60-T, Trial Chamber, Judgment, January 17, 2005, para.645

¹¹ ICTR, Prosecutor v. Seromba, *supra* note 10, paras.47-48

¹² ICTR, Prosecutor v. Semanza, *supra* note 10, para.322

¹³ ICTY, Prosecutor v. Tolimir, IT-05-88/2-T, para.738

mind' is defined more broadly than in mental health sciences and is not limited to psychiatric disorder, but comprises any mental disorder that manifests itself in violence and is prone to recur.¹⁴ In civil law jurisdictions like the French one, the Penal Code enables diminished criminal responsibility for persons 'suffering from a psychological or neuropsychological disorder'.¹⁵ While as noted this definition is closer to the mental health findings,¹⁶ still, it is underlined that the focus of the provisions is not so much to the exact nature of the mental disorder but rather the alteration of the intellectual insight and the potentially caused loss of control.¹⁷

At the same time, while courts can set their own criteria of what constitutes 'disease of the mind' and its impact on the pronounced sentence, in both common and civil law, it is ultimately for mental health experts to declare whether an individual bears a certain psychological or psychiatric condition. The courts take these psychiatric evaluations as a given fact and judicially incorporate them accordingly in their judgments. The case of *R v. Sullivan* before the House of Lords is an example taken from the English jurisprudence that clearly illustrates this issue. Sullivan had an established diagnosis of epilepsy. One day, while visiting

¹⁴ For the fact that this is the case with English courts see Rafiq Memon, Legal Theory and Case Law defining the insanity defence in English and Welsh law, 17(2) J. Forensic Psychiatry & Psychology 230, 240 (2006); *Bratty v. Attorney General for Northern Ireland* [1963] AC 386 (Lord Denning) available at <http://www.bailii.org/uk/cases/UKHL/1961/3.html>; *R v. Sullivan* [1984] AC 156 (the House of Lords ruling that epilepsy constitutes a disease of mind). For the fact that U.S. courts follow on the issue the standards set by English jurisprudence see Herbert Fingarette, The Concept of Mental Disease in Criminal Law Insanity Tests, 33 U. Chicago L. Rev. 229 (1996). For the fact that the same is true also for courts in Australia and New Zealand see Bruce Arrigo & Stacey Shipley, INTRODUCTION TO FORENSIC PSYCHOLOGY: ISSUES AND CONTROVERSIES IN CRIME AND JUSTICE, 2nd ed., Elsevier, 2005, 112

¹⁵ Art.122-1, French Penal Code available at <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000029370748&cidTexte=LEGITEXT000006070719&dateTexte=20160619&oldAction=rechCodeArticle&fastReqId=27496891&nbResultRech=1> (in French)

¹⁶ Caroline Fournet, Between Lack of Responsibility and Dangerousness: Determinism and the Specificity of the French Criminal Law on Lack of Intellectual Insight and Loss of Control in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Alan Reed & Michael Bohlander eds., Routledge, 2016) 355

¹⁷ Ibid

his neighbor, he had a seizure and, at the same time, hit his friend. Despite the fact that doctors testified that epilepsy was not a ‘disease of the mind’, the Court ruled to the contrary.²⁶

The Court did not doubt that medically Sullivan had an epilepsy seizure. Rather what the Court discussed was whether epilepsy could be termed a ‘disease of the mind.’ Similarly, under French criminal law, it is up to the court to evaluate how a person’s mental disorder impacts his final sentence.²⁷ Taking the analogy to the international field and the discussion of warfare’s psychological impact, international judges have the discretion of defining mental harm differently than mental health sciences. Nevertheless, in order to decide whether a civilian has suffered mental harm, courts must resort to the aid and findings of fields such as psychiatry and psychology.

The need to resort to mental health experts becomes more acute given that sometimes it may be difficult to delineate and trace mental harm. In this case, recourse from experts would be even more imperative in order to contest whether or not mental harm has been incurred.²⁸ In comparison to mental harm, physical injury is externally manifested to the naked eye and can be easily assessed even in absence of any medical reports asserting it. The common rules of sense, which are to be applied by judges according to the law of evidence embedded in the various statutes of the international criminal courts and tribunals, permit them to easily discern whether a certain wounding can be termed grave. Yet, psychological harm, or the scars that a

²⁶ Rafiq Memon, Legal Theory and Case Law defining the insanity defence in English and Welsh law, 17(2) J. Forensic Psychiatry & Psychology 230, 241 (2006)

²⁷ Article 122-1 of the French Penal Code stipulates that the court bears the mental disorder factor in mind when it comes to pronounce the punishment and the manner in which it is going to be carried out. On this see Jean Pradel, Criminal Law in INTRODUCTION TO FRENCH LAW (George Bermann & Etienne Picard eds., Kluwer Law International, 2008) 120

²⁸ Eliav Lieblich, Beyond Life and Limb: Exploring Incidental Mental Harm under International Humanitarian Law in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES, Derek Jinks et als eds., 2014, 185, 201-202 (mentioning and persuasively refuting the intangibility argument)

certain event has left on a person's psyche, is not always demonstrable and cannot be assessed without resorting to the dicta of mental health sciences.

With no set standards of when warfare's psychological impact becomes 'serious' and with no recourse from mental health experts, any assessments of psychological harm by international criminal judges run the fear of being arbitrary, jeopardizing the defendants' rights and casting doubts on whether such an approach is in tandem with the legality principle in criminal law that requires all convictions to take place on firm grounds. As noted by Judge Herrera Carbuccion in her dissenting opinion on Laurent Gbagbo's acquittal, 'reasoned judgments allow the parties and the public to know the legal and factual basis upon which the accused has been convicted or acquitted. The right to a reasoned judgment is essential to a fair trial, in particular to protect against arbitrariness.'³⁵ Justice Cossio-Diaz of the Mexican Supreme Court also remarks that just as scientists and experts cannot claim for themselves the competence to assess evidence, delineate legal notions and conduct the balance between different legal precepts, the judge does not have equally the competence to construct the reasoning in cases where the premises of this reasoning are based on scientific notions. If the judge does so, there is a risk that judgments issued are unfounded and unjustified.³⁶ It is on this account that the thesis will argue for the introduction of the Daubert standard in international criminal law. This will also serve as a mode for compelling international criminal judges to only formulate their opinions on the level and nature of civilians' suffering through recourse from mental health experts.

³⁵ ICC, Trial Chamber I, Situation in the Republic of Cote d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Ble Goude, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, ICC-02/11-01/15, 15 January 2019, para.22

³⁶ National Supreme Court of Justice, Voto Concurrente que formula el Ministro Jose Ramon Cossio Diaz en el Amparo en Revision 2146/2005, fallado por el Pleno de la Suprema Corte el Veintisiete de Febrero de 2007 at 12 available at http://207.249.17.176/Transparencia/Epocas/Pleno/Novena%20%C3%A9poca/2005/5_VOTO_CONCURRENT E_AR_2146_05_PL.pdf

Endorsed now in U.S. federal legislation,³⁸ the U.S. standard traditionally relates to the admissibility of expert evidence and can be seen as introducing two different components. The first, relates to the need for judges to only base their judgments on matters of expertise on scientifically reliable opinions and reports, while the second refers to the establishment of a threshold test for judges in order for them to evaluate the scientific validity of any expert opinions. On this account, the U.S. Supreme Court drafted in *Daubert* a number of parameters that judges must take into account, for example whether the expert report is based on reliable methods and whether it has been published in peer review journals.

The current thesis will not focus on the threshold aspect of the *Daubert* judgment that is largely linked to the ‘gatekeeping’ role that judges must play and has led to both States and scholars having reservations regarding the standard’s adoption.³⁹ Rather, this thesis will focus on the first component of the standard and will argue for *Daubert* to be transplanted into international criminal law so that judges are required to base their related mental harm assessments on scientifically reliable views only. Also, it is not an accident that in the U.S. it is this general scientific reliability requirement that has led scholars and courts to view *Daubert* as establishing such an obligation beyond any admissibility realm. Along these lines, the standard has been invoked by courts as a way for judges, through reference to expert opinions, to decide on whether a matter should be deemed to be scientifically valid.⁴⁰ Scholars have

³⁸ Rule 702, U.S. Federal Rules of Evidence

³⁹ As far as States are concerned see the case of Ireland discussed in Chapter 5. For the reservations of scholars see *infra* Chapter 4.

⁴⁰ For example, in the *Kitzmiller* case, the U.S. District Court, reached the conclusion that intelligent design should not be taught at schools as an alternative to the evolution theory because intelligence design did not rest on scientifically reliable grounds in order to be termed as ‘science’. The Court did not explicitly refer to the *Daubert* standard but the parameters it used in order to discredit intelligent design as a scientific theory closely related to it. For example, the Court noted that the intelligent design theory had failed to gain acceptance in the scientific community, had not generated peer-review publications and it had not been the subject of testing and research, all criteria established by the U.S. Supreme Court in the *Daubert* case as coming to answer the question of what constitutes ‘science.’ On this see *Kitzmiller et al. v. Dover Area School District*, 400 F. Supp. 2^d 707 (M.D. Pa.2005); See also Megan Dillhoff, Science, Law and Truth: Defining the Scope of the *Daubert* Trilogy, 86 Notre Dame L. Rev. 1289, 1314 (2011) (providing the references in the *Daubert* case where the U.S. Supreme Court necessitated a theory to have been tested, published in peer-review journals, being subject to rebuttal and be of general acceptance in order to be deemed as ‘scientific’); Jay Wexler, *Kitzmiller* and the ‘Is it Science’ Question, First Amendment L. Rev. 90, 105 (2006); Joelle Anne Moreno,

equally argued that the judicial review of acts and decisions of U.S. administrative organs that rule on issues of expertise, for example the case of EPA on environmental issues, must include a consideration of whether these decisions and acts rest on scientifically valid grounds.⁴¹

In that sense, contrary to the pre-Daubert Frye standard in U.S. jurisprudence where the duty to rely on science befell only upon the expert and judges merely reviewed whether the experts could do this task, *Daubert* rendered clear that it is the task of judges to express themselves on scientific matters and assess whether any conclusions on these have been reached through a reliable scientific methodology.⁴² If we can draw a parallel from the way judges are called to deal with legal cases, we could say that *Frye* established a stance towards science reminiscent of the legality review judges undertake in public law. As in public law and legality review, judges only examine whether certain acts abide by the legal rules without entering into further examining their content and purpose. As well, under *Frye*, judges are meant to see only whether the furnished reports conform to the principles of science without being able to question their conclusions.

On the contrary, *Daubert* gives the authority to the judge to do so, making clear what courts and scholars have stressed, namely that the expert cannot be inaugurated as a co-decider

It's Just a Shot Away: MMR Vaccines and Autism and the End of the Daubertista Revolution, 35 Wm. Mitchell L. Rev. 1511, 1534-39 (2009). Similar contentions have been brought forth in the cases referring to the autism tests, most notably these of *Cedillo*, *Hazlehurst* and *Snyder*, involving children who had been vaccinated against contagious children diseases such as measles, mumps and rubella and after some years were diagnosed with autism disorder. There, the courts relied explicitly on the Daubert standard in order to assess not the admissibility of expert evidence but the reliability of the scientific contentions and reach a judicial conclusion that could be scientifically validated. On these see *Cedillo et al. v. Secretary of Health and Human Services*, U.S. Court of Appeals, Fed. Circ., Judgment, August 27, 2010; *Hazlehurst et al. v. Secretary of Health and Human Services*, U.S. Court of Appeals, Fed. Circ., Judgment, May 13, 2010; *Snyder v. Secretary of Health and Human Services*, U.S. Court of Federal Claims, No.01-162V, filed August 11, 2009; Megan Dillhoff, *ibid*, 1305-1309 (2011); Donald McNeil Jr., Court says Vaccine not to Blame for Autism, N.Y. Times, Feb.12, 2009 available at <http://www.nytimes.com/2009/02/13/health/13vaccine.html>

⁴¹ Paul Miller & Bert Rein, 'Gatekeeping' Agency Reliance on Scientific and Technical Materials after Daubert: Ensuring Relevance and Reliability in the Administrative Process, 17 Touro L. Rev. 297 (2016); Andrew Trask, *Daubert and the EPA: An Evidentiary Approach to Reviewing Agency Determinations of Risk*, University of Chicago Legal Forum 569, 585 (1997); Alan Charles Raul & Julie Zampa Dwyer, 'Regulatory Daubert': A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles into Administrative Law, 66(7) Law & Contemporary Problems 7,44 (2003)

⁴² See *infra* the discussion in Chapter 4

together with the judge.⁴³ The latter remains the sole arbiter of the case and this is true also in matters of expertise. Similar to the merits review of acts and decisions where judges review not only their conformity with legal rules but also whether their content and goal is in tandem with the existent legal framework,⁴⁴ under *Daubert* the judge is entitled to check not only whether the experts' reports typically conform to generally accepted scientific standards but also put into scrutiny the actual content of the reports' scientific conclusions. Still, the susceptibility of the scientific conclusions to judicial scrutiny means that scientific issues cannot be discussed unless they are based on a reliable epistemological basis. If this basis is not provided in the reports and opinions put before the judge's consideration, it is the judge who must introduce it to the legal proceedings.

Yet, even if conceded that such a scientific reliable platform of mental harm assessment must be introduced in international criminal law, the question is how. On this, the thesis would like to propose that this could take place through the international criminal law principles mode as the latter appear in international criminal law having a norm-begetting function. On this, special reference will be made to the ICC Statute with the ICC currently being the only international criminal court with universal jurisdiction.

The potential of the international criminal law principles to generate a change in international criminal law is embedded in their nature. The fact that they are 'principles', renders clear that it is not the legal rules, but rather their essence, that international criminal

⁴³ On the fact that this is especially a concern among judges both in Europe as well as in Latin American jurisdictions see for example the reference on the issue by the Supreme Court of Peru in Corte Suprema de Justicia de la Republica, Sala Penal Transitoria, R.N.No 1658-2014, Lima, 15 March 2016 at 38-39 available at http://blog.pucp.edu.pe/blog/jaimedavidabantotorres/wp-content/uploads/sites/125/2016/03/CS_D_RESOLHOMICPARTE01_15032016.compressed.pdf as well as

European Commission for the Efficiency of Justice, Working Group on the Quality of Justice, Study on the role of Experts in Judicial Systems of the Council of Europe Member States, Strasbourg, 1 September 2014 at 5

⁴⁴ For the distinction between the legality review and the merits review see David Bennett, Balancing Judicial Review and Merits Review, 53 Admin. Rev. (2000) 4

judges are expected to employ.⁴⁵ When it comes to *Daubert*, this means that the question is not whether the standard in toto can apply as a general principle, but instead its basic precepts. These must be seen as focusing on the new elements the standard came to bring to the jurisprudential discussion, namely the need for judges to relate to issues that go beyond their expertise along epistemologically reliable grounds. The question is, then, whether this reliability precept can be deemed to be so cardinal and given its existence in a number of different and diverse jurisdictions, if it can be considered to be a general principle of law. If the answer is affirmative, the Daubert standard could apply in international criminal law to the extent that such application would not negate the causes of international criminal justice; on the contrary, it would promote them and would further fulfil the role scholars have envisioned about general principles as ‘norm sources’, focusing on the adaptation of existing rules to new needs and realities.⁴⁶

As will be discussed in the next chapter, to the extent that psychological suffering triggers international criminal repercussions once it constitutes ‘serious mental harm’, the introduction of the Daubert standard in international criminal law would oblige the judge to articulate through reliance on psychological or psychiatric reports furnished ad hoc why the particular individual testifying before the court has sustained such harm. Such individualized psychological opinions and reports could be furnished either at the time of the indictment writ when the witnesses’ list is compiled or even, due to the time lapse since the events, during the oral proceedings when these civilians testify before court if rendered feasible.⁴⁷ If such harm

⁴⁵ Fabian Raimondo, *General Principles of Law as applied by International Criminal Courts and Tribunals*, 6 *The Law and Practice of International Courts and Tribunals* 151 (2007)

⁴⁶ Robert Kolb, *Principles as Sources of International Law*, 53 *Netherlands Int’l. L. Rev.* 1, 9 (2006)

⁴⁷ Sometimes the time gap between the time the crimes have been committed and the taking place of the trial proceedings can be so big that the civilian mental harm incurred due to the defendant’s actions cannot be accurately measured during the trial stage. Such instances may refer to cases for example where the defendant is fugitive and is being apprehended only years after the issuing of the indictment writ. For example in the case of Karadzic, the initial indictment writ was filed in 1995 for alleged crimes committed between 1992-95, yet the actual trial proceedings took place only in 2016 due to the defendant being fugitive all these years. On this see Amended Indictment against Radovan Karadzic Unsealed, The Hague, October 2002 available at <http://www.icty.org/en/press/amended-indictment-against-radovan-karadzic-unsealed> ; Prosecutor v. Karadzic,

cannot be traced anymore due to the advent of time between the commitment of the crime and the opening of the trial, the judge should at least call for a mental health expert to testify whether, based on the specific events and the status of the civilian at the time of the trial, it would be plausible to assume that he or she could have experienced serious mental harm.

1.2 The Importance and Contribution of the Thesis

A potential application of the Daubert standard by international criminal courts and tribunals bears ramifications both inside and beyond the international criminal justice framework. Firstly, the requirement to resort to witnesses connects international criminal law with domestic law and the treatment of expert testimonies there. Already from ancient times, expert witnesses were called to testify in criminal trials.⁵⁷ In ancient Rome, information on record shows that the body of Julius Caesar was examined by Antisius, who opined that it was the sword thrust in Caesar's thorax that caused his death, rather than any other of the total

IT-95-5/18-T, Public Redacted version of judgment issued on 24 March 2016, vol. I, 24 March 2016 ,p.p.1-2,5 (the Trial Chamber noting inter alia the possible impact of the passage of time to the reliability of the witnesses' testimonies.) According to a study, the effects of the missile attacks on Israeli civilians exposed to these attacks, were weak three months after their termination. On the other hand, a study coming to assess the posttraumatic stress in a group of medical students exposed to the NATO strikes in the former Yugoslavia, found that even 1 year after the attacks, 11% of the affected students suffered from PTSD and the level of intrusion and avoidance symptoms-both characteristic clusters of PTSD-related symptoms- remained significant. In another study, 14% of ethnic Albanian Kosovars were found to meet PTSD criteria even two years after the end of hostilities in Kosovo. Finally, another study conducted in 2003 on Israelis who had been taken as prisoners of war during the Yom Kippur war in 1973 revealed that 23% out of a sample of polled such prisoners continued to meet criteria for PTSD even 30 years after their captivity had ended. On these see Jelena Gavrilovic et al., Predictors of Posttraumatic Stress in Civilians 1 Year after Air Attacks: A Study of Yugoslavian Students, 190(4) J. Nervous & Mental Disease 257,260 (2002); William Fernandez et al., Mental Health Status among ethnic Albanians seeking medical care in an Emergency Department two years after the war in Kosovo: A Pilot Project, 43(2) Annals of Emergency Medicine 1 (2004); Zahava Solomon & Rachel Dekel, Posttraumatic Stress Disorder among Israeli ex-prisoners of war 18 and 30 years after release, 66 J. Clinical Psychiatry 1031,1035 (2005). These studies underline on one hand the importance for the indictment writ to be compiled and mental health scientists to assess the psychological harm of the civilians called to testify in trial as close as possible to the traumatic event and secondly that such psychological expert assessments can have a validity for the criminal proceedings even if compiled long after the incriminating event and the defendant's actions.

⁵⁷ For the fact that a witness is qualified as an 'expert' by knowledge, skill, experience, training or education see Rule 702, U.S. Federal Rules of Evidence available at https://www.law.cornell.edu/rules/fre/rule_702 See also Jefferson Ingram, CRIMINAL EVIDENCE, 12th ed., Elsevier, 2015, 419

twenty-two stabbings.⁵⁸ Mental harm issues have always been in the epicentre of judicial proceedings. This is acutely demonstrated in medieval Europe where mental harm illnesses were connected with perceptions of witchcraft⁵⁹ and individuals who suffered from mental illnesses were seen as suffering from ‘mania.’⁶⁰ As a result, in countries such as England, till the middle of the 19th century, medical witnesses were not often called to assess individuals’ mental health conditions.⁶¹ When they were called, such as in France, it was not so much in order to assert whether or not a particular individual suffered from a mental disorder, but rather to assert the jargon of ‘mania’ the legal system had adopted for such situations.⁶² Later in the 19th century, however, psychiatric experts gradually started replacing the non-expert witnesses regarding the pronouncement of mental health issues.⁶³ Throughout the 20th century, law came to develop a separate stance from mental health sciences on its definition of mental illness and mental harm,⁶⁴ but courts still rely on the scientific expertise of psychiatrists in mental health issues.

Secondly, particularly as far as warfare’s psychological impact is concerned, the thesis contributes to judges discussing matters of mental harm and suffering more accurately and responsibly. Psychological and psychiatric opinions and reports on the psychological harm sustained by civilians testifying before the court as victims, renders the judges the ability to assess whether the incurred harm can be deemed to be ‘serious’ based on epistemological evidence rather than arbitrary personal assertions. This is the case regarding the decisions of

⁵⁸ Thomas Gutheil, *The History of Forensic Psychiatry*, 33 J. Am. Academy of Psychiatry & L. 259 (2005)

⁵⁹ *Ibid* at 260

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ Tony Ward, *Psychiatry and Criminal Responsibility in England 1843-1939* (DPhil Thesis, 1996)

international criminal courts and tribunals concerning mental disorders, such as PTSD, and the reparations due to be awarded to civilians for the mental harm they experienced.⁶⁵

By relying on ad hoc provided mental health experts' opinions for the particular civilians testifying before the court, international criminal judges pronounce a verdict on the mental harm inflicted *in concreto* to the particular individuals and not *in abstracto* to a larger group of civilians as is currently the case. In this sense, to the extent that the defendant is being tried for particular harm caused to particular individuals rather than for the wide-scale harm hostilities have caused, the *in concreto* personification of the incurred harm meets this requirement and adds to the credibility of the judicial pronouncements.

It is true that in describing whether the incurred psychological harm to civilians is so grave as to constitute 'serious mental harm', the mental health expert reports and opinions cannot simply determine whether or not such harm has, in fact, been inflicted. As noted above, the *causation* of such 'serious mental harm' is in some cases explicitly mentioned in the Statutes of international courts and tribunals as a prerequisite for the assertion of an international crime as it constitutes part of a crime's *actus reus*, namely the elements that must be in place in order for the crime to be committed. Nevertheless, any psychological or psychiatric reports on the causes of mental harm tell us little about the crime's *mens rea*, namely the question whether a person applying a certain degree of force affecting civilians wanted their psychological harm to occur. This is particularly important given that according to the ICC Statute,⁶⁶ conviction for an international crime is not based only on the creation of a certain result or situation but also on the culprit's knowledge that such a result would be incurred and his intention to nevertheless cause it.

⁶⁵ See infra Chapter 7

⁶⁶ On this see art.30 of the ICC Statute

Understandably, the existence of such knowledge and intention is difficult to prove. Along these lines, the consideration of psychological or psychiatric reports and opinions does not mean that the number of defendants who will be convicted rather than acquitted will automatically augment. It does mean though that the *actus reus* issues of the crimes will come to be discussed in a methodological and scientifically ordained way when matters of mental harm are involved. If a proper conclusion can be made regarding the assertion or not of the crime's *actus reus*, the *mens rea* intention and knowledge requirements can be further discussed the way such questions have already been addressed both on a domestic law level as well as in the international criminal law realm.⁶⁷

The wider ramifications of the role mental health experts can play in international proceedings opens the discussion of their utility also beyond criminal courts and tribunals. For example, in the realm of the ICJ, in the *Pulp Mills* case, Judge ad hoc Vinuesa lamented the fact that 'despite the lack of specialized expert knowledge, the Court sets itself the task of choosing what scientific evidence is best, discarding other evidence and evaluating and weighing raw data and drawing conclusions.'⁶⁸ Matters become worse given that many times ICJ judges are presented not only with many, but also with conflicting opinions on matters that evade their legal expertise. In the *Gabcikovo-Nagymaros* case regarding the construction of a dam in the Danube river, the Court noted that the numerous furnished scientific reports provided abundant evidence that the project's impact and its environmental implications were

⁶⁷ As far as domestic criminal law is concerned, for the role 'reasonableness' plays as a construction on these knowledge and intent-inferring issues and its limitations see Hisham Ramadan, *Reconstructing Reasonableness in Criminal Law: Moderate Jury Instructions Proposal*, 29 J. Legislation 233 (2013) (discussing the U.S. legal order); Lisa Silver, *Is this the end of subjective Intention? The Supreme Court of Canada and the Walle case*, 27 July 2012 available at <http://www.ideablawg.ca/blog/2012/7/27/is-this-the-end-of-subjective-intention-the-supreme-court-of.html> (discussing the Canadian jurisdiction). See also Rudolf Alexander Mikus, *The Reasonable Person in Substantive Canadian Criminal Law*, Thesis submitted to the University of British Columbia, 1995 (discussing also the concept of reasonableness in German criminal law at 120 ff.). On an international criminal law level see discussion of inference of the intent in the Karadzic case in Marko Milanovic, *ICTY convicts Radovan Karadzic*, EJIL!Talk, 25 March 2016 available at <https://www.ejiltalk.org/icty-convicts-radovan-karadzic/>

⁶⁸ *Pulp Mills on River Uruguay*, Judgment, ICJ Rep. 2010 14, Dissenting Opinion of Judge ad hoc Vinuesa, para.71

considerable.⁶⁹ Yet, these reports, penned by three different groups of experts, equally but differently viewed the question of whether these environmental implications were as grave as to be posed as a red line to the existence of the dam.⁷⁰ If the Daubert standard applied, the scientific reliability of the furnished reports, as an additional admissibility factor, could see some of them being ultimately rejected on methodological grounds making it easier for the Court to decide which one of them to rely on.

Equally, in other instances, international courts have opted to rely upon expert opinions, but in a defective way without addressing State concerns that these opinions do not lie on a firm, epistemological basis. For example, in the *Artava Murillo* case, the Inter-American Court of Human Rights was asked to hold that the Costa Rican prohibition of the in vitro fertilization practice violated the applicants' rights to raise a family.⁷¹ In order to decide on the matter, the Court summoned the opinions of seven experts and heard four of them in the oral proceedings.⁷² Yet, coming to address claims by Costa Rica that some of the expert opinions provided should not be taken into consideration by the Court because they did not rest on a solid scientific basis,⁷³ the Court evaded the task of any *Daubert*-prone assessment by opting to see the Costa Rican contentions as relating not to the admissibility of the relevant evidence, but rather its probative value. The Court should have, instead, resorted to a Daubert standard rationale and argued for the existence or not of certain criteria in these opinions which would make them eligible for judicial consideration. Along these lines, the Court held that it would

⁶⁹ ICJ, *Gabcikovo-Nagymaros Project*, Judgment, ICJ Rep. 1997, Sept. 25, 1997, p.74, para.140

⁷⁰ Guillaume Gros, *The ICJ's Handling of Science in the Whaling in the Antarctic case: A Whale of a Case?*, 6 J. Int'l. Dispute Settlement 578, 579, n.10 (2015); Makane Moise Mbengue, *International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication*, 34 Loy.L.A. Int'l. & Comp. L. Rev. 53,64 (2011)

⁷¹ Inter-American Court of Human Rights, *Artavia Murillo et al. ('in vitro fertilization') v. Costa Rica*, Judgment of 28 November 2012

⁷² *Ibid*, paras.11-12

⁷³ *Ibid*, paras.50 and 60

take into account the particular expert opinions together with the rest of the provided evidence.⁷⁴

The fact that international judges do not rely on expert opinions at all or they rely in a way that is problematic from a methodological point of view, has been criticized by scholars.⁷⁵ This phenomenon can be tolerated up to a point on account of the international courts' aspirations to cultivate and promote their institutional autonomy. However, when it comes to international criminal courts and tribunals, the fact that non reliance on epistemological assertions leads ultimately to the conviction of individuals and their incarceration rather than to only the political shaming of States or the payment of indemnities, makes the current practice more problematic and urges the need for reform.

Respect for the defendant's rights has been the cornerstone of every criminal system in order for trials to be deemed fair. A trial is not fair if the law does not award certain rights to the defendant. A trial is not fair if the court does not respect these rights or if judges reach conclusions that are not based on evidence. Yet, the trial is equally not fair if despite all these conditions being met, the procedure leading to the attainment of evidence is blemished. The current thesis argues that this is exactly the case when it comes to the assessment of warfare's psychological impact on civilians.

1.3 The Thesis Method

The thesis proposes the reform of the current expert evidence assessment system through the introduction of the Daubert standard in international criminal law. Acknowledging

⁷⁴ Ibid, paras.52 and 61

⁷⁵ Makane Moise Mbengue, *International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication*, 34 *Loy.L.A. Int'l. & Comp. L. Rev.* 53,64 (2011)

the cardinal role comparative law has played when it comes to the elaboration of general principles in both international law⁷⁶ and international criminal law in particular⁷⁷ and the pivotal role comparative law has played in the formation of international criminal procedure,⁷⁸ I will argue for such a Daubert standard application based on a comparative legal analysis.

Comparative law can have many meanings, encompassing totally different tasks such as the comparison of legal systems in order to find out what law ought to be, the study of foreign legal systems, the justification of law making by mapping what has happened in another country and the looking into the arrangements in different countries when it comes to a specific topic or aspect⁷⁹ like in the case of the current thesis. This does not mean that the relevant comparative analysis purports to be monolithic. Whereas the thesis will undertake a straightforward comparative law approach by juxtaposing different criminal procedure provisions and discuss various judgments,⁸⁰ in acknowledgment of the assertion that legislation and judicial decisions-what has been termed as the ‘official portrait’ of a legal system⁸¹-provide an incomplete picture about the actual legal reality,⁸² the thesis, driven by a functionalist comparative approach,⁸³ will look also beyond the official binding documents of the legislative

⁷⁶ L.C. Green, *Comparative Law as a Source of International Law*, 42 *Tulane L. Rev.* 52 (1967-1968)

⁷⁷ Mireille Delmas-Marty, *L’Influence du Droit Compare sur l’Activite des Tribunaux Penaux Internationaux in CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES* (Antonio Cassese & Mireille Delmas-Marty eds., Presses Universitaires de France, 2002) 465

⁷⁸ Sergey Vasiliev, *The Usage and Limitations of Comparative Law and the Methodology of International Criminal Procedure*, 2 *Revista Eletronica de Direito Penal* 165,166, December 2014

⁷⁹ Otto Pfersmann, *Ontological and Epistemological Complexity in Comparative Constitutional Law in NEW DIRECTIONS IN COMPARATIVE LAW* (Antonina Bakardjieva Engelbrekt & Joakim Nergelius eds., Edward Elgar Publications, 2009) 84

⁸⁰ For the fact that the study and comparison of different legal systems represents a ‘straightforward comparative project’ see Mitchel de S.O. -l’E. Lasser, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY*, Oxford University Press (2009) 13

⁸¹ *Ibid* at 30

⁸² *Ibid* at 12. The particular author palpably demonstrates this when he states and shows how judgments of French courts ‘represent only part of the judicial story’ and that the other part comprises a ‘doctrinal and judicial component’ which is to be found in the views of the academics and the Report produced by the Rapporteur of the case and which is not explicitly included on a separate basis in the final issued judgment. On this see *ibid* at 279

⁸³ The question that lies in the heart of the functional method is how a concept is dealt similarly in a number of different jurisdictions not only in the Statute books but also as far as the function of the norm is concerned. In other words, what lies in the heart of the functionalist approach is ‘what legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of

and judiciary powers-namely laws and judgments- and discuss also works of the practitioners⁸⁴ or judicial documents, mainly interpretational rules in the assessment of evidence drafted by Supreme Courts,⁸⁵ in an attempt to examine how the assessment of evidence is actually understood and implemented by judges in the criminal procedure of the examined jurisdictions. The fact that the functional comparative approach has been largely adopted by scholars to extract notions from municipal law and apply them to international law as general principles,⁸⁶ is an additional reason why the thesis opts to use this comparative method as its tool for examining whether the Daubert standard reliability precept can apply in international criminal law.

At the same time, the thesis is aware that as the standard, positivist view about comparative law is accused of not being to place any comparative conclusions inside the wider social and political context,⁸⁷ also the functional method may be seen as overtly putting the emphasis on similarity, ignoring context and cultural particularity.⁸⁸

As a response to this criticism generally geared towards the functional comparative method, the comparative analysis endorsed by this thesis does not stay so much to the question of whether the Daubert standard arrangement as encapsulated in Rule 702 in the U.S. Rules of Evidence appears on an exact mode also in other jurisdictions. Rather, mirroring a postmodern approach to comparative law, the thesis looks on whether the principles behind the Daubert

another system. On these see Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 ICLQ 800, 809 (2000); W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 ICLQ 485,517 (1974)

⁸⁴ For the important role academics play for the evolution of law in continental law countries where case law is not binding see Mitchel de S.O. -l'E. Lasser, *supra* note 80 at 39-40 (discussing the case of France)

⁸⁵ From all the comparative law theorists, Ernst Rabel has stressed how it is insufficient to compare only code sections, emphasizing the need to compare also the practice of courts noting that 'a code without its accompanying cases is but a skeleton without muscles'. On this see Vernon Valentine Palmer, 4 *Global Jurist Frontiers* 1,22 (2004)

⁸⁶ Jaye Ellis, *General Principles and Comparative Law*, 22 *EJIL* 949,959 (2011)

⁸⁷ Roger Cotterrell, *The Concept of Legal Culture in COMPARING LEGAL CULTURES* (David Nelken ed., Routledge, 1997) 13-14

⁸⁸ Francesca Bignami, *Formal versus Functional Method in Comparative Constitutional Law*, 53 *Osgoode Hall L. J.* 442,452 (2016)

standard and most notably the reliability of the presented expert evidence precept, is to be found also in other legal orders.⁸⁹ On this account, the fact that it is the *animus* of the Daubert standard rather than its *corpus* that is being sought for, is further illustrated on the way the various legal orders are examined in conjunction with their social and historical particularities.⁹⁰ Thus, the way the various jurisdictions are grouped in the subsequent chapters as belonging either to the common law or to the continental law legal tradition, is directly associated in many instances with the question of whether or not these jurisdictions formed part of the British Empire. Historical associations are provided also in other cases throughout this thesis, for example in the discussion of the Latin American, the African countries or the Far East countries like China, Japan and South Korea.

In all the studied jurisdictions, the thesis reviews the criminal procedure arrangements on the assessment of expert evidence in a quest to reach a conclusion on whether the need for the judge to utter an opinion on matters of expertise only through reliance on scientific opinions and reports, is a precept that can be deemed to constitute a general principle of criminal law. Scholars have stressed how when it comes to the detection of a general principle of international law, the value of the comparative research lies not necessarily on the large number of domestic jurisdictions studied, but on their representativeness.⁹¹ On this account, efforts have been made for a representative selection of the various legal orders that are examined in the realms of this thesis based on a ‘legal systems’ categorization⁹² along the question of whether the respective countries belong to the common or continental law tradition and whether they follow the adversarial or the inquisitorial system in criminal proceedings. A special

⁸⁹ Mathias Siems, *COMPARATIVE LAW*, Cambridge University Press (2014) 97-99

⁹⁰ On this account see Mitchel de S.O. -l’E. Lasser, *supra* note 80 at 35 (discussing the way French judicial decisions are drafted along the historical background of the judge’s role in France)

⁹¹ Jaye Ellis, *supra* note 86 at 956-957

⁹² The particular categorization is considered to be reliable compared to others despite the criticism it has received. On this see Ellis, *ibid* at 957

analysis has been provided in cases like Italy, Israel or a large number of Latin American countries where these two criteria do not necessarily coincide. Whereas the drafters of the ICC Statute never included a list of countries that should be examined in these cases,⁹³ in the thesis I have undertaken the task of mapping the legal landscape in roughly the same number of countries endorsing the inquisitorial or the adversarial system in their criminal procedure, including the legal orders to which international criminal courts and tribunals cite the most, namely Germany, Australia, France, England and Wales, Italy and Canada in their comparative analysis of various issues.⁹⁴

Moreover, granted that scholars have underlined how a comparative analysis must also emphasize non-western legal orders,¹¹¹ the thesis has tried to ensure that jurisdictions from all over the globe are examined and discussed. Particularly when it comes to Africa, with most African countries following the wider criminal procedure system they inherited from the colonizing powers, the thesis has placed emphasis only on those countries in the continent, which for political and historical reasons such as the creation of a new state in South Sudan or a new legal order in Rwanda due to the genocide there, re-evaluated any provisions they might have inherited from their colonial past. Special attention is put on Latin America where a considerable number of States that historically partook in the inquisitorial system, have decided, in the last few decades, to make a switch to the adversarial one. With *Daubert* stemming from an adversarial legal order like the U.S. one, the thesis examines whether the Latin American switch equally brought to an endorsement of *Daubert* by these countries. Finally, since in coming to relate to the general principles of international criminal law, article 21 of the ICC Statute plays an emphasis on the legal orders of the ICC Member States,

⁹³ On this see Fabian Raimondo, *supra* note 45 at 151-152

⁹⁴ *Ibid* at 393,402

¹¹¹ Edward Eberle, *The Methodology of Comparative Law*, 16 *Roger Williams U. L. Rev.* 51,54 (2011); Edward Eberle, *The Method and Role of Comparative Law*, 8 *Wash. U. Global Studies L. Rev.* 451,473 (2009)

particular attention has been given also to the need for the majority of the examined countries to fulfil also this condition. Nevertheless, apart from the U.S. from where *Daubert* originates in the first place, also other non-ICC Member States like India, China or Israel are also discussed when deemed necessary for the inclusiveness of the research.

The comparative analysis undertaken is a reform-oriented one to the extent that its results will aspire to pose an argument of how the current legal approach towards the assessment of psychological harm should take a different route.¹¹² Whereas the *Daubert* standard can equally apply in civil and tort law cases and there is relevant comparative literature to support this,¹¹³ the comparative study that will be undertaken in the realm of this thesis will focus primarily on criminal law cases and will deviate from the literature due to the thesis' international criminal law focus. An exception to this is for those cases where non-discussion of any civil law jurisprudence would render a wrong impression about the applicability of the standard in a particular jurisdiction.

At the same time, the endorsement of the comparative legal analysis as the preferred methodological tool, has been made in full cognizance of the limitations such an approach poses. For example, de S.O.-l'E. Lasser demonstrated in his discussion of the French, U.S. and E.U. legal orders how each legal system has its own distinctive legal structures and features.¹¹⁴ The person undertaking a comparative analysis must be aware of this and place any conclusions in context in order not to end up comparing 'apples and oranges' as de S.O.-l'E. Lasser eloquently puts it.¹¹⁵ On this account, the fact that the thesis resorts to the comparative method

¹¹² For more on the reform-oriented research mode as a subcategory of the doctrinal analysis see Terry Hutchinson, *The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law*, 3 *Erasmus L. Rev.* 130 (2015)

¹¹³ See for example the examination of the role of *Daubert* in tort law in 4 different jurisdictions, namely Canada, the United Kingdom, Germany and Japan in Andrew Jurs, *Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of post-Daubert U.S. Reliability Determinations*, 95 *Marquette L. Rev.* 1329 (2012)

¹¹⁴ Mitchel de S.O. -l'E. Lasser, *supra* note 80 at 298

¹¹⁵ *Ibid* at 270

in order to extract a common principle-that of the reliability of expert evidence-rather than the exact adherence to a particular legal rule posed by one country and followed by the others, helps to moderate the dangers lurking from attributing an all-encompassing role to comparative law. Principles rather than whole positivistic legal arrangements are more likely to be found pervading various jurisdictions, since law does share certain elements.

Another limitation that the comparative law analyst must be aware of is the choice of the countries to be examined. Many comparative endeavours focus just on English-speaking countries or on Germany and France as far as continental Europe is concerned, simply because researchers speak mostly English, German and French and thus have the ability to peruse legal documents from the original only in these languages.¹¹⁶ A comparative analysis including only the Anglo-Saxon world or Germany and France as the main continental law countries, may have a limited practical utility and it is certainly not useful in the context of a broader scientific research.¹¹⁷ For this reason, the current thesis has tried to overcome this limitation by exploring equally other jurisdictions. In some cases this has been rendered possible due to my knowledge of the relevant languages (Spanish, Greek, Hebrew) whereas in other cases, particularly when it came to the study of the Far East countries, like China, Japan and Korea, I relied on published material in English.

Certain words must be said also about the notion of warfare that provides the factual background against which the judgments of the international criminal courts and tribunals are examined. Whereas warfare can include also non-military measures,¹²⁰ in the realms of the

¹¹⁶ Mark van Hoecke, *Methodology of Comparative Legal Research*, *Law and Method*, December 2015 at 3-4 available at <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf>

¹¹⁷ *Ibid* at 4

¹²⁰ Apart from cyber warfare, this is the case for example also with economic warfare and hybrid warfare. Aiming at damaging the economy of the enemy, economic warfare has been described as comprising methods ranging from blockade tactics to decentralized economic counter-measures in peacetime, economic warfare can involve the application of both forcible as well as non-forcible measures. On this see Vaughan Lowe & Antonios Tzanakopoulos, *Economic Warfare*, *Max Planck Encyclopaedia of Public International Law*, March 2013, paras.1, 8-21 available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law->

thesis the notion will refer only to situations where civilians find themselves in the midst of a turmoil involving the use of force, irrespective of whether or not the magnitude of the undertaken force is such in order for an armed conflict also to exist or whether such conflict takes place at land, sea or air or is internal or international. The applied force is examined irrespective of its defensive or offensive character.¹²¹ Moreover, the psychological impact of warfare will relate only to *jus in bello* scenarios and will not include *jus ad bellum* instances where civilians, recipients of threats of aggression, become terrorized and the affected state proceeds to the opening of hostilities against the state or non-state actor posing the particular threat.¹²⁴

[9780199231690-e292](#); Ignaz Seidl-Hohenveldern, *INTERNATIONAL ECONOMIC LAW*, Kluwer Law International, (3rd ed.,1999)161; Agnieszka Jachec-Neale, *THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICE*, Routledge (2015) 92. From its turn, hybrid warfare is the term used by scholars to address the fact that modern conflicts are neither purely asymmetric nor purely conventional. The term is understood to comprise both military as well as non-military measures. On this see Shane Reeves & Robert Barnsby, *The New Griffin of War: Hybrid International Armed Conflicts*, *Harvard Int'l. Rev.* 17 (2013); Aurel Sari, *Legal Aspects of Hybrid Warfare*, *Lawfare Blog*, October 2, 2015 available at <https://www.lawfareblog.com/legal-aspects-hybrid-warfare>

¹²¹ As noted by Michael Schmitt, article 49(1) of API defines attacks as 'acts of violence against the adversary, whether in offence or in defence'. On this see Michael Schmitt, 'Attack' as a Term of Art in International Law: The Cyber Operations Context in *PROCEEDINGS OF THE 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT* (C. Czosseck & R. Ottis eds.,2012) 285 available at http://www.ccdcoe.org/publications/2012proceedings/CyCon_2012_Proceedings.pdf

¹²⁴ Such scenarios can arise in cases the terrorization of civilians can lead to discussions on whether the affected party is entitled to a pre-emptive self-defence right due to the fear its civilians harbour. For the fact that such an option does not lie in harmony with the existing criteria of a pre-emptive attack see Matthew Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 *EJIL* 151, 160 (2013) (citing the Caroline incident doctrine). See also Thomas Franck, *RECOURSE TO FORCE: STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS*, Cambridge University Press (2002) 107 (referring to a 'clearly' imminent attack); Ashley Deeks, *Russian Forces in Ukraine: A Sketch of the International Law Issues*, *Lawfare Blog*, March 2, 2014 available at <http://www.lawfareblog.com/2014/03/russian-forces-in-ukraine-a-sketch-of-the-international-law-issues/> (noting that fear of an impending attack must be based on objective facts as well as facts that have or are reasonably expected to transpire). Along these lines, the International Law Commission has not found threats of aggression as sufficient to give rise to the right to self-defence. On this see 1991 ILC Code of Offences against the Peace and Security of Mankind, art.16, Commentary, point (5) reprinted in *THE TRAVAUX PREPARATOIRES OF THE CRIME OF AGGRESSION* (Stefan Barriga & Claus Kress eds.2012) Cambridge University Press, 189. See also the fact that the crime of aggression as integrated in the Rome Statute refers to the 'planning, preparation, initiation or execution...of an act of aggression...' Nowhere in this definition is the element of threats mentioned. On this see Mary Ellen O'Connell & Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute*, 10 *J. Int'l. Crim. Justice* 189, 199 (2012). On the history of the provision's adoption see Claus Kress & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 *J. Int'l. Crim. Justice* 1179 (2010). On this account see also the fact that although the 1951 and 1991 drafts of the Code of Offences against the Peace and Security of Mankind made reference also to 'threats of aggression', in later drafts this reference to 'threat of aggression' is dropped and only cases of actual aggression are contained. On this see ILC Draft Code of Offences against the Peace and Security of Mankind, 2 *Yearbook of the Int'l. L. Commission* 134,135 (1951); 1991 ILC Draft Code of Offences against the Peace and Security of Mankind, 2 *Yearbook of the Int'l.*

1.4 The Thesis Structure

This Chapter introduces the problematic upon which the thesis rests and sketches the approach advocated as a possible solution. Chapter 2 proposes that the problem stems from the inconsistent way international criminal courts and tribunals relate to civilians' psychological harm. Chapter 3 discusses how the problem could be solved using international criminal law contours through the introduction of a legal norm that would oblige judges to take into account ad hoc provided mental health experts' opinions and reports. Taking into account Article 21 of the ICC Statute, which delineates the sources of international criminal law on which the ICC can rely, and given that no statutory or customary provisions are in place for the issue, the chapter explores the role general principles play and their norm-begetting function in international law, in particular, international criminal law.

Concluding that the general principles of international criminal law could be a mode through which the Daubert standard could be introduced in international criminal law, Chapter 4 discusses the standard in the U.S. legal order, history, and evolution. Chapters 5 and 6 remain

L. Commission 1991 at 96; 1996 ILC Draft Code of Offences against the Peace and Security of Mankind, 2 Yearbook of the International Law Commission (1996), art.16. See also the definition of aggression provided in the Annex of the UN General Assembly Resolution 3314 (UNGA Res.3314, 2319th plenary mtg., Dec.14, 1974, Annex, art.1). For the fact that threats of aggression comprise acts demonstrating the aggressor's volition to attack and they do not refer to the fear the victim state's civilians may have harboured as a result of these threats see Patrycja Grzebyk, *CRIMINAL RESPONSIBILITY FOR THE CRIME OF AGGRESSION*, Routledge (2010) 109. For the fact that the act of aggression must be an act which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations see Mary Ellen O'Connell & Mirakmal Niyazmatov, What is Aggression? Comparing the Jus ad Bellum and the ICC Statute, 10 J. Int'l. Crim. Justice 189, 199 (2012). See though also the Palmer Report characteristically noting that 'The United Nations Charter, Article 2 (4) prohibits the use of force generally, subject to an exception under Article 51 of the Charter for the right of a nation to engage in self-defence. Israel has faced and continues to face a real threat to its security from militant groups in Gaza. Rockets, missiles and mortar bombs have been launched from Gaza towards Israel since 2001.....Since 2001 such attacks have caused more than 25 deaths and hundreds of injuries. The enormity of the psychological toll on the affected population cannot be underestimated....It seems obvious enough that stopping these violent acts was a necessary step for Israel to take in order to protect its people and to defend itself. (Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, para.71). For a similar reading of the report on this point see Eliav Liebllich, *supra* note 28 at 192

in the domestic realm and embark on the comparative analysis to attest whether the standard's precepts can be also met in other legal orders: Chapter 5 covers common law jurisdictions, while Chapter 6 relates to the applicability of the standard beyond the common law world.

Returning back to the international criminal contours, Chapter 7 will examine whether the reluctance of international criminal courts and tribunals to discuss warfare's psychological impact based on psychiatric and psychological reports should be attributed to an inherent, structural setback of the international criminal law system. In this realm, it will discuss how international criminal judges, most notably those in the ICC, have taken into account such in concreto provided scientific reports in the sentencing phase in order to assess how much the gravity of the incurred psychological harm should affect sentencing of the defendant or the reparations awarded to the civilian victims. Finally, the thesis conclusion is in Chapter 8.

Chapter 2: *International Criminal Courts and Tribunals and the Assessment of Warfare's Psychological Impact upon Civilians*

2.1 Introduction

A unique oxymoron lies with international criminal courts and tribunals: whereas their statutes provide for expert witnesses in court proceedings¹³³ and international criminal courts and tribunals have resorted to the aid of experts in the past,¹³⁴ when it comes to warfare's psychological impact, these judicial bodies have largely opted to relate to such impact on their terms in deference to any opinions or reports of mental health experts.

Along these lines, instead of resorting to opinions of mental health experts to assess this harm, international criminal courts and tribunals have largely coined on their own the characteristics that 'serious mental harm' entails. Thus, it 'need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.'¹³⁵ In other instances, international criminal courts and tribunals have held that 'serious mental harm' must involve more than 'a vague state of anxiety',¹³⁶ going 'beyond temporary unhappiness.' Without

¹³³ Kai Ambos, *TREATISE ON INTERNATIONAL CRIMINAL LAW*, Vol. III: INTERNATIONAL CRIMINAL PROCEDURE, Oxford University Press, 2016, 483 (noting how in the realm of the Tribunals the initiative is left to the parties, whereas the ICC follows the civil law tradition and endorses the list of experts, leaving the relevant initiative to the judge)

¹³⁴ See the use of experts by the ICTY in the Slobodan Milosevic case at http://www.zoominfo.com/CachedPage/?archive_id=0&page_id=1314854292&page_url=//www.diplomaticobservers.com/news_read.asp?id=179&page_last_updated=2007-02-23T23:36:19&firstName=Eric&lastName=Baccard. See also the use of such experts as implied from the ICC transcripts in the Katanga case at Prosecutor v. Katanga, Transcript No.139, p.33, ICC-01/04-01/07-T-139-Red-ENG WT 11-05-2010 1/66 EA T (with reference to Dr. Baccard)

¹³⁵ ICTY, Trial Chamber, Prosecutor v. Krstic, IT-98-33--T, Judgment, 2 August 2001, para.513

¹³⁶ ICTR, Appeals Chamber, Prosecutor v. Seromba, *supra* note 10, paras.47-48

having to be permanent or irremediable,¹³⁷ in order to be asserted, it must nevertheless bear the characteristics of a ‘grave and long disadvantage to a person’s ability to lead a normal and constructive life.’¹³⁸

This judicial stance, to the extent that it describes and does not define the concept of ‘serious mental harm’, fails to rest on certain criteria and even if it does, courts and tribunals have not elaborated on their nature. The absence of such criteria makes it impossible to review the reasonableness of the courts’ pronouncement on the issue, such reasonableness being a cardinal element of the judicial legal reasoning in criminal law.¹³⁹ As a result, the assessments on the mental harm suffered by the civilians are characterized by a great degree of uncertainty.¹⁴⁰ Yet, judges could have been furnished with criteria for the assessment of warfare’s psychological impact if they had opted to rest their pronouncements on opinions and reports penned *in concreto* by mental health experts.

In the context of warfare, it is not feasible to expect psychologists and psychiatrists to be at hand to readily assess the civilians’ mental harm right after they have experienced certain emotions. Moreover, as stated in Chapter 1, such a psychological assessment cannot always bear fruit if undertaken months or years after the traumatizing event. Thus, what is being argued is that, in their judgments, international criminal courts and tribunals should reach the most epistemologically accurate point possible when depicting and rendering legal importance to the civilians’ suffering. The employment of mental health experts is not meant to necessarily reconstruct the pain and suffering these civilians have felt, but rather to provide an indication

¹³⁷ ICTR, Trial Chamber, *Prosecutor v. Semanza*, supra note 10, para.322

¹³⁸ ICTY, Trial Chamber, *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgment, 12 December 2012, para.738

¹³⁹ David Crowley-Buck, Unreasonable Reasonableness: Standardizing Procedural Norms of the ICC through Al Bashir, 34 B.C. Int’l. & Comp. L Rev. 15,21-22 (2011); Hisham Ramadan, Reconstructing Reasonableness in Criminal Law: Moderate Jury Instructions Proposal, 29 Journal of Legislation 233 (2003)

¹⁴⁰ Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW, Vol. III: INTERNATIONAL CRIMINAL PROCEDURE, Oxford University Press (2016) 210

to the judge on whether the inflicted mental harm can indeed be termed as ‘serious’ as required by the relevant international criminal law and laws of war provisions.¹⁴¹

Such an approach, which could entrench the discussion of warfare’s psychological impact on solid empirical and doctrinal grounds, has been undertaken on other facets of warfare’s psychological impact which relate to the credibility of the provided testimony rather than the suffered harm. For example, in *Lubanga*, the ICC Trial Chamber called a psychologist to testify on whether the psychological trauma a child soldier had experienced could impact his memory.¹⁴² Arguably, such resort to mental health experts could be applied to cases where warfare’s negative psychological impact extends to civilians.

Hence, the current chapter, in conjunction with Chapter 7, will delineate how, while still far from reaching such an approach on methodological grounds, international criminal courts and tribunals are slowly moving towards this direction. The analysis will focus in this chapter on the ICTY, the ICTR and the ICC and not to other courts, for example the Special Court for Sierra Leone, to the extent that it is these international criminal judicial bodies that have rendered evidence that there can be international criminal responsibility for the civilians’ mental harm. Moreover, as the focus here is on ‘international’ rather than ‘transnational’ criminal courts, the chapter will not discuss the jurisprudence of hybrid criminal courts, which try international crimes, but apply norms derived from the domestic legal order rather than purely from international rules.¹⁴³

¹⁴¹ See the analysis *infra* in this chapter

¹⁴² Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, 14 March 2012, para.105

¹⁴³ Sarah Nouwen, ‘Hybrid Courts’: The Hybrid Category of a new Type of International Crimes Courts, 2 Utrecht L. Rev. 190 (2006). For an indicative list of which courts which be deemed as ‘hybrid’ see Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Issues* (2009), Doctoral Thesis submitted to Durham Law School available at http://etheses.dur.ac.uk/38/1/Final_PDF_version.pdf?DDD19+,p.32

Based on these premises, the chapter will critically discuss the relevant international criminal jurisprudence in the next section. To the extent that the criminal prosecution of the incidental incurrence of mental harm is difficult to bear fruit,¹⁴⁴ the discussion of such harm will take place through cases where its causation has been intentional. Such cases include examples fitting the realm of a number of crimes, from the crime of genocide to the commitment of inhumane acts. The chapter will then proceed to delineate the doctrinal problems that arise for the defendant's rights as well as for the integrity of the judicial process from the fact that these judicial bodies do not rely on mental health expertise or do not provide the reliability criteria upon which such reliance takes place.

2.2 Warfare's Psychological Civilian Impact and the ICTY

The ICTY has referred to warfare's psychological toll on civilians in a number of cases related to the terrorization of these civilians. One such example is the case of Dragomir Milosevic concerning the siege of Sarajevo by Serb forces during the civil war in the former Yugoslavia. Dragomir Milosevic was commander of the relevant forces who was accused of undertaking a campaign of sniping and shelling against the city's civilian population.¹⁴⁵ This campaign led not only to physical injuries and deaths among the affected civilians, but also to a large impact on their psychological well-being.¹⁴⁶ The Trial Chamber found Milosevic guilty of murder and causing inhumane acts due to the physical casualties and also guilty of the crime of spreading terror due to the psychological impact the extensive shelling and sniping had on

¹⁴⁴ On this see Jessica Lawrence & Kevin Jon Heller, *The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime*, 20 *Georgetown Environmental L. Rev.* 1 (2007)

¹⁴⁵ ICTY, *Prosecutor v. Dragomir Milosevic*, Case No.IT-98-29/1-PT, Prosecution's Submission of Amended Indictment pursuant to Rule 50 and Trial Chamber's Decision dated 12 December 2006, 18 December 2006, para.5

¹⁴⁶ Ibid at paras.16,18,23

the inhabitants of Sarajevo.¹⁴⁷ Ultimately, Milosevic was convicted on these charges, including for spreading terror. The Appeals Chambers upheld the charges but reduced the imposed sentence slightly.¹⁴⁸

Regarding the crime of terror, the Trial Chamber was led to the conclusion without resorting to a psychological or a psychiatric expert opinion that the attacks against Sarajevo ‘left deep and irremovable mental scars on that population as a whole’ and that the psychological effect of the bombs that fell was ‘tremendous.’¹⁴⁹ Responding to the defendant’s argument that such lack of scientific opinions should constitute grounds for an appeal, the Appeals Chamber held that Milosevic failed ‘to substantiate his assertion that in the circumstances of the present case it was necessary for the Trial Chamber to resort to such specialized knowledge.’¹⁵⁰ The Appeals Chamber, noting that the Trial Chamber had considered ‘voluminous evidence showing the psychological impact the shelling and sniping had on the civilian population,’¹⁵¹ proceeded to explicitly discuss the following relevant evidence in detail: one woman had testified that her daughters returned from collecting water with their clothes soiled because of the fear they experienced; a doctor stated that mental health casualties exceeded physical casualties; and other witnesses recounted that they had harboured fear and lasting psychological effects.¹⁵²

The Appeals Chamber deemed enough to come to conclusions on the psychological impact Milosevic’s actions incurred only by reiterated as proof these testimonies and without ordering any further psychological evaluation of the civilians testifying as witnesses. The only

¹⁴⁷ ICTY, Trial Chamber, *Prosecutor v. Dragomir Milosevic*, IT-98-29/1-PT, Judgment, 12 December 2007, para.1006

¹⁴⁸ ICTY, Appeals Chamber, *Prosecutor v. Dragomir Milosevic*, IT-98-29/1-A, Judgment, 12 November 2009, paras.331,337

¹⁴⁹ ICTY, Trial Chamber, *Prosecutor v. Dragomir Milosevic*, supra note 146, para. 910

¹⁵⁰ ICTY, Appeals Chamber, *Prosecutor v. Dragomir Milosevic*, supra note 147, para.117

¹⁵¹ Ibid

¹⁵² Ibid

psychological assertion coming from a scientist was the testimony provided by the doctor, but it was also too general and did not refer to the mental harm suffered by the particular civilians testifying before the Tribunal.

Due to this, there would be doubts on whether these testimonies can be of any service in the realm of an international criminal trial where punishment must be explicitly based on proven facts related to the particular incident in question. At the same time, it can be argued that for the Appeals Chamber, such a thorough scientific approach might not be considered to be cardinal since, according to its rationale, the fact that the Trial Chamber had established that these attacks undertaken by Milosevic's forces constituted unlawful attacks causing serious injury and death, the threshold gravity for the crime of terror should be deemed as having also been met.¹⁵³

Yet, it is important to note that the linking of physical devastation and carnage to the psychological impact attacks may have had, led Judge Liu Daqun to make a different statement regarding the crime of terror in his partly dissenting opinion.¹⁵⁴ The Judge noted that for the Chamber's majority, the victims of the crime of terror were not these civilians who were terrorized, but instead were those injured by the acts of violence.¹⁵⁵ To the extent that this comprised also civilians killed by the attacks, Judge Daqun deemed this to be problematic because civilians were considered victims of the crime of terror even if they had not survived the attacks in order to live with the created terror.¹⁵⁶ Along these lines, Judge Daqun proposed the crime of terror to be based on the actual terrorization of civilians, measured not in conjunction with the physical casualties these civilians have suffered but through the mental

¹⁵³ ICTY, Appeals Chamber, *Prosecutor v. Dragomir Milosevic*, supra note 148, para.33

¹⁵⁴ Ibid, Judge Liu Daqun partly dissenting opinion

¹⁵⁵ Ibid, para.22

¹⁵⁶ Ibid

trauma or psychological harm caused.¹⁵⁷ This harm would be determined ‘on a case-by-case basis’ ‘in light of most recent developments in psychological disorders.’¹⁵⁸

In that sense, Judge Daqun’s dissenting opinion demonstrates that: hurdles exist for international judges because of the lack of epistemological standards for the measurement of warfare’s psychological impact; any judicial attempts to resort to pronouncements on mental health issues with no reliance on mental health expert opinions are bound to be general, inconsistent, and insufficient and; reliance on mental health experts’ opinions and reports could address the issue.

The case of *Blaskic* is another case that presents similar problems regarding the assessment of the mental harm incurred by the civilians. Blaskic was a Bosnian Croat colonel who was indicted, convicted, and sentenced for crimes against humanity, grave breaches of the Geneva Conventions, war crimes concerning operations of the Bosnian Croat army aimed to ethnically cleanse Bosnia from non-Croats, and crimes committed against Muslim Bosnians. It should be noted that Blaskic was indicted and consequently convicted for the fact that, through his acts, he deliberately caused serious mental harm to the affected civilians.¹⁵⁹ On these grounds, in coming to assert the indictment charges, the Trial Chamber did not refer to any mental health experts’ opinions, but only to the testimonies of civilian victims. The Chamber thus asserted that the soldiers under Blaskic’s command ‘terrorized the civilians by intensive shelling, murders and sheer violence’¹⁶⁰ and that the women and children who were detained in camps as a result of these military operations, ‘were terrorized and threatened by their guards.’¹⁶¹ The indictment writ’s description of ‘inhumane acts’ was that these acts were meant

¹⁵⁷ Ibid, para.25

¹⁵⁸ Ibid, para.25, n.51

¹⁵⁹ ICTY, Trial Chamber, *Prosecutor v. Blaskic*, IT-95-14-T, Judgment, 3 March 2000, paras.13,16

¹⁶⁰ Ibid, para.630

¹⁶¹ Ibid, para.695

to cause great mental and physical suffering.’¹⁶² However, given that there was no reference to scientific opinions on the magnitude of the caused mental harm, the Trial Chamber considered these acts to have caused mental harm of such magnitude that could render them to be termed ‘inhumane.’

In the Trial Chamber’s rationale, psychological or psychiatric assessments on the issue of the caused harm were replaced with a descriptive approach which the judges undertook on their own. By combining a number of heinous acts such as the use of human shields, beatings, physical and psychological abuse and intimidation, and the deprivation of food and water,¹⁶³ the magnitude of the caused harm could be demonstrated. The Chamber thus referred to the ‘atmosphere of terror reigning in the detention facilities’ as a manifestation of the crimes of cruel and inhumane treatment.¹⁶⁴ In that sense, the Trial Chamber did not take the approach that the degree of the caused mental harm should be left to be diagnosed by mental health experts, but rather it held that this could be done by the judges themselves as long as cases were assessed ‘on a case by case basis with due regard for the individual circumstances.’¹⁶⁵

In *Blagojevic*, the question of whether or not mental harm was sustained by the victims acquired an additional value. Vidoje Blagojevic and Dragan Jokic were indicted for committing various crimes against Bosnian Muslims during the Yugoslav civil war, including the forcible transfer of women and children and the killing of Bosnian Muslim men.¹⁶⁶ In the indictment, the prosecution did not claim any physical or mental harm suffered by the victims of the defendants’ policies.¹⁶⁷ Nevertheless, in its final brief, the prosecution did claim that the killing of the men combined with the abuse they sustained and the forced transfer of women out of

¹⁶² Ibid, para.238

¹⁶³ ICTY, Appeals Chamber, *Prosecutor v. Blaskic* IT-95-14-A, Judgment, 29 July 2004, para.154

¹⁶⁴ ICTY, Trial Chamber, *Prosecutor v. Blaskic*, supra note 159, para.700

¹⁶⁵ Ibid, para.243

¹⁶⁶ *Prosecutor v. Blagojevic & Jokic*, Amended Joinder Indictment, Case IT-02-60-T, 26 May 2003, para.30

¹⁶⁷ ICTY, Trial Chamber, *Prosecutor v. Blagojevic et als*, IT-02-60-T, Judgment, 17 January 2005, para.644

Srebrenica did result in serious mental harm for the survivors.¹⁶⁸ Reference was made to the lasting effects of the psychological trauma for these survivors and the continuation of nightmares and feelings of fear and depression among the women from Srebrenica long after the event.¹⁶⁹

On these grounds, in a number of instances in the body of the judgment, the Trial Chamber referred to the effect of the defendants' policies on the civilian victims and concluded, without any recourse to any psychological or psychiatric authority, that the suffering experienced by these civilians met the threshold of serious mental harm. For example, regarding the forced displacement of women, children, and the elderly, the Trial Chamber noted that 'it is convinced' that such displacement 'was itself a traumatic experience which in the circumstances of this case reaches the requisite level of causing serious mental harm.'¹⁷⁰ However, even though the Trial Chamber listed the civilian victims' experiences, it did not elaborate further on how it shaped its conviction that this level of trauma had been reached. Similarly, the Trial Chamber found that the mental harm suffered by survivors of these attacks who had lost their relatives, equally reached constituted 'serious mental harm.'¹⁷¹

Yet in other instances, the Trial Chamber did proceed in this same case to relate to the findings of mental health experts, namely that the women from Srebrenica suffered from nightmares, feelings of fear, and depression and their psychological condition was 'still extremely grave.'¹⁷² Nevertheless, instead of relating these mental health reports to the facts of the case, the judges opted to make general assertions that 'serious mental harm' was inflicted in a number of incidents without backing their claims on psychological or psychiatric evidence

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Ibid, paras.650, 652

¹⁷¹ Ibid, para.653

¹⁷² Ibid, para.644, n.2062

contained in the experts' opinions. The Trial Chamber did not relate to the case of these women but proceeded to state, on account of other incidents and without providing any mental health findings to buttress its claim, that there was sufficient evidence to establish beyond a reasonable doubt that the trauma suffered by the survivors of mass executions constituted 'serious mental harm.'¹⁷⁴ Furthermore, with no reliance to mental health expert sources, the Trial Chamber proceeded to make psychological assertions such as that 'the fear of being captured...the sense of utter helplessness and extreme fear...is a traumatic experience from which one will not quickly-if ever-recover.'¹⁷⁵ Similarly, the Trial Chamber stated that 'the men suffered mental harm having their identification documents taken away from them.'¹⁷⁶

In another instance, the Trial Chamber brought up its awareness of the fact that 'the men who were separated, detained, abused and subsequently killed, suffered serious mental harm in that they knew what their fate was.'¹⁷⁷ On these grounds and in order to assert whether 'serious mental harm' had been inflicted, the Trial Chamber did not rely on any psychological holdings. The judges, noting that the notion was not defined in the ICTY Statute, scanned the previous jurisprudence on the characteristics such mental harm takes according to international criminal tribunals.¹⁷⁸ As a result, the Trial Chamber found that there was evidence in order to conclude 'beyond reasonable doubt' that the trauma and wounds suffered by the individuals who managed to survive the executions did constitute serious bodily and mental harm.¹⁷⁹

The Trial Chamber noted that it was equally convinced that the displacement of children, women, and the elderly was a traumatic event that had caused serious mental harm. On these grounds, it proceeded to recount the wanderings of the affected civilians in their quest

¹⁷⁴ Ibid, para.647

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Ibid, para.649

¹⁷⁸ Ibid, para.645

¹⁷⁹ Ibid, para.647

to find a safe refuge from the atrocities and the threats to their lives.¹⁸⁰ It ultimately concluded that there was ‘no doubt’ that the suffering of all these people who were subjected to the atrocities for which the defendants were held accountable, was to such an extent as to reach ‘the threshold of serious mental harm’ under Article 4(2)(b) of the ICTY Statute.¹⁸¹ Moreover, the level of mental anguish suffered by those displaced from their homes and the particular policies undertaken ‘in such a manner as to traumatize them [the victims]’, constituted ‘serious mental harm.’¹⁸² Lastly, the Trial Chamber held that the mental harm suffered by the survivors who had to undergo the experience of searching for the bodies of their beloved persons met the ‘required threshold to constitute serious mental harm.’¹⁸³

The same approach towards mental harm and the lack of any reliance on the opinions and reports of mental health experts can be found in the ICTY’s discussion of civilians’ mental harm from acts not directly related to the application of armed force during warfare, but rather from other warfare-related incidents. For example, in *Martić*, the Trial Chamber held that it would assess on a case to case basis whether the acts of torture caused ‘severe physical or mental pain or suffering.’¹⁸⁴ For its assessment, it would take a number of factors into account ‘including the duration of the suffering inflicted, the nature of the crimes, the physical or mental condition of the victim, the effect of the acts on the victim, the victim’s age and the victim’s position of inferiority to the perpetrator.’¹⁸⁵ On these grounds, the Trial Chamber concluded that ‘in light of all the circumstances in which beatings and mistreatment were carried out’ the detainees had been subjected to serious physical and mental suffering, especially since some of these beatings and mistreatment took place as part of an intimidation policy.¹⁸⁶ Similarly in

¹⁸⁰ Ibid, para.650

¹⁸¹ Ibid, para.652

¹⁸² Ibid

¹⁸³ Ibid, para.653

¹⁸⁴ ICTY, Trial Chamber, *Prosecutor v. Martić*, IT-95-11--T, Judgment, 12 June 2007, para.75

¹⁸⁵ Ibid

¹⁸⁶ Ibid, para.408

Limaj, the ICTY noted that the events which victims of international crimes recounted in their testimonies ‘were extremely traumatic events, involving at times matters of life or death.’¹⁸⁷ In *Celebici*, the ICTY Trial Chamber, referring to the testimonies of victims or their friends and relatives, emphasized that it ‘recognizes that recollection and articulation of such traumatic events is likely to invoke strong psychological and emotional reactions, including feelings of pain, fear and loss.’¹⁸⁸

In *Krstic*, the ICTY Trial Chamber discussed the question of ‘serious mental harm’ inside the general framework of the crime of genocide and acts that left victims with the scars of pain and fear.¹⁸⁹ These acts were committed by the Bosnian Serb Army under the responsibility of Krstic, the army general and commander,¹⁹⁰ following the take-over of Srebrenica.¹⁹¹ In particular, under Article 4(b) of the ICTY Statute, the Trial Chamber came to pronounce on whether the defendant had committed genocide by inflicting serious bodily or mental harm to his victims.¹⁹² On this account, the Trial Chamber referred to the trauma suffered by the survivors exemplified through the sentiments of pain and fear they felt and concluded that Krstic’s acts had caused ‘serious mental harm.’¹⁹³

The *Krstic* judgment is an example of one where the Trial Chamber took into account the mental health expert’s testimony on the inflicted mental harm. The judgment referred to the testimony of an NGO director who provided psychological support for the survivors of the Srebrenica take-over and noted that those who were younger children had developed

¹⁸⁷ ICTY, Trial Chamber, *Prosecutor v. Limaj*, IT-03-66-T, Judgment, 30 November 2005, para.15

¹⁸⁸ ICTY, *Prosecutor v. Delalic et al. (Celebici case)*, Trial Chamber, IT-96-21-T, Judgment, Nov.16, 1998, para.595

¹⁸⁹ ICTY, Trial Chamber, *Prosecutor v. Krstic*, supra note 135, para.91

¹⁹⁰ Ibid, para.3

¹⁹¹ Ibid

¹⁹² Ibid, para.483

¹⁹³ Ibid, para.91 (noting that ‘the pain and fear associated with having so many loved ones torn away makes it very difficult for those who survived to think of returning home’)

adjustment problems, such as low levels of concentration, nightmares, and flashbacks¹⁹⁴ and that the level of the assessed trauma was ‘exceptionally high.’¹⁹⁵

Nevertheless, the judgment did not proceed to scientifically determine how severe the mental harm causing the high level of trauma needed to be in order to bear international criminal repercussions. The Trial Chamber did not resort to a mental health expert opinion in order to answer the question of whether such trauma met the legal requirements the courts and tribunals have set in order for a case of mental harm to be termed ‘serious.’ Rather, it opted to decide on its own that, in light of the trauma suffered by the survivors of the mass executions, it was convinced that the civilians affected by Krstic’s acts suffered ‘serious mental harm.’¹⁹⁶

2.3 The Assessment of Warfare’s Psychological Impact in the Realm of the ICTR

The ICTR has dealt with a number of cases where fear was created among the civilians who were victims of abhorrent acts, but the creation of fear was not the distinct aim of the acts. For example, in *Akayesu*, the defendant was charged for being present at, and even facilitating acts of sexual assault, beatings, and murder which all gave rise as the Tribunal notes to feelings of ‘constant fear.’¹⁹⁷ These acts inflicted, according to the Tribunal, not only physical but also mental harm as part of a general policy of genocide.¹⁹⁸ In coming to reach such a conclusion, the Trial Chamber did not rely on any mental health scientific findings. Commenting on the infliction of serious bodily or mental harm and without separating the two forms of harm in its observations, the Trial Chamber noted that such harm should not

¹⁹⁴ Ibid, para.92

¹⁹⁵ Ibid. para.93

¹⁹⁶ Ibid., para.514

¹⁹⁷ ICTR, *Prosecutor v. Akayesu*, Trial Chamber I, Judgment, ICTR-96-4-T, September 2,1998, para.6

¹⁹⁸ Ibid, paras.7,705,707

necessarily be permanent and irremediable.¹⁹⁹ It continued to cite torture, inhumane or degrading treatment, and persecution as examples of such harm.²⁰⁰ The Trial Chamber acknowledged, on its own, the existence of trauma among the affected civilians caused by the crimes they were subjected to without resorting to mental health expert opinions. Along these lines, the Trial Chamber noted that

‘many of the eye-witnesses...have seen atrocities committed against their family members or close friends...The possible traumatism of these witnesses...is a matter of particular concern to the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light.’²⁰¹

Moreover, the Trial Chamber, to the extent that it was not able to assess the existence of such trauma in some instances, preferred, instead, to resort to the aid of mental health experts to assume that this should be the case. It thus stated that

‘The Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from posttraumatic or extreme stress disorders and has therefore carefully perused the testimonies of these witnesses, those of the Prosecutor as well as those of the Defence, on the assumption that this might possibly have been the case....’²⁰²

The lack of such trauma diagnosis by relevant scientists received additional dimensions in this particular case through the Trial Chamber’s own assertion that the inconsistencies in the witnesses’ testimonies during the pre-trial and main trial stages should be explained by the

¹⁹⁹ Ibid, para.502

²⁰⁰ Ibid. para.504

²⁰¹ Ibid. para.142

²⁰² Ibid, para.143

trauma these civilians had experienced which had rendered recollection of precise details difficult.²⁰³

Niyitegeka is another case that equally raised the question of the impact that the mental suffering by civilians has on the judicial assessment of the legal characterization of a certain act undertaken during warfare. Here, the question was whether the mental suffering the civilians experienced due to the defendant's actions was to such an extent as to legally term the defendant's acts as 'inhumane' and thereby convict him under Article 3 of the ICTR Statute.²⁰⁴

In order to reach this conclusion, the Trial Chamber did not rely on any psychological findings, but rather looked at the nature of the defendant's acts. The Trial Chamber described how Niyitegeka rejoiced when Assiel Kabanda, a prominent Tutsi, was captured and subsequently killed, decapitated, and castrated, and his skull was pierced through the ears with a spike.²⁰⁵ The Chamber found that

‘the jubilation of the Accused, particularly in light of his leadership role in the attack, at the decapitation and castration of Kabanda, and the piercing of Kabanda's skull, supported and encouraged the attackers, and thereby aided and abetted the commission of these crimes.’²⁰⁶

The Trial Chamber reached a similar conclusion on account of an incident where Niyitegeka instructed his men to sharpen and insert a piece of wood into the genitals of a female corpse after the woman had been shot dead.²⁰⁷ It concluded that the relevant acts were ‘acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human

²⁰³ Ibid. para.455

²⁰⁴ ICTR, *Prosecutor v. Niyitegeka*, Amended Indictment, Case No. ICTR-96-14-T, June 26, 2000, p.p. 65,67 available at <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-96-14/indictments/en/000626.pdf>

²⁰⁵ ICTR, Trial Chamber, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgment, 16 May 2003, para.462

²⁰⁶ Ibid

²⁰⁷ Ibid at 463

dignity of the Tutsi community as a whole.’²⁰⁸ The Trial Chamber did not further elaborate on why these particular acts met the ‘seriousness’ threshold or why would they were deemed to cause mental suffering to the general civilian population even though they concerned specific individuals.

At the same time, these questions could have been addressed by the Trial Chamber to the extent that they were raised during the oral proceedings. On this account, the defendant’s lawyers, after stressing that the prosecution grounds of causation of serious mental or physical suffering or injury or serious attack on human dignity should be seen as referring to the insertion of the piece of wood into the deceased woman’s genitalia, proceeded to argue that the particular event did not have a sufficient impact and was not of such a scale to fulfil the ‘inhumane acts’ requirements.²⁰⁹ When asked by the Trial Chamber’s President how they could make such a claim and whether it had to do with the fact that the insertion of wood to the genitalia was done to a corpse and not to a living person, one of the defence lawyers provided the following answer:

‘Yes, ma’am. And of course, that can’t be rape either when your Lordships are considering rape. I don’t believe one can rape a deceased person, it may be necrophilia or something, but it is not rape in the criminal sense. But the evidence with relation to the shock or the horror, I think, was that the witness was going to his lunch and he got goose bumps, my Lord, had his lunch and got goose bumps on the way back when he saw it, my Lord. And I say that is clearly not in the category of the type of horror and mental suffering that this particular section of the statute is designed to prevent or address.’²¹⁰

²⁰⁸ Ibid, para.465

²⁰⁹ ICTR, *Prosecutor v. Niyitegeka*, Trial Chamber, Case No. ICTR-96-14-T, Redacted Transcript, Feb. 27, 2003, p.37

²¹⁰ Ibid

This answer rendered clear that the connection of the incident with the notion of mental harm focused on the fact that the sight of the corpse with the piece of wood inside her genitalia caused goose bumps to the witness because of the horror and shock he experienced before this heinous sight. Nevertheless, in its judgement, the Trial Chamber did not proceed to relate this incident to the goose bumps the civilian felt in order to attempt a linkage between the committed act and its implications for the civilian's psychology. In that sense, the Trial Chamber did not relate, at all, to the question of whether the experiencing of goose bumps could lead to harm of such a degree in order for it to be termed as 'serious.'

The same issue regarding the ICTR's non-elaborate analysis on how it reached the 'seriousness' conclusion regarding the inflicted mental harm can be found in the *Kayishema and Ruzindana* judgment.²¹¹ There, the defendants were charged for their role in the massacres that took place in the regions of Kibuye and Bisesero during the Rwandan genocide. The Trial Chamber found them both guilty of genocide. In coming to address the charge in the indictment concerning the perpetration of 'inhumane acts' according to Article 3 of its Statute, the Tribunal referred to the serious character these acts must have as far as mental harm is concerned and continued by stating that

'....The Prosecution on the other hand suggests that victims have suffered mental harm amounting to other inhumane acts due to them having witnessed atrocities for which the accused is responsible. For example, in relation to Count 4 the Prosecution submits

"with respect to serious mental harm, six survivors testified (and the survivors of all the other massacres testified) that they witnessed family members and friends being killed. As established by the evidence, Tutsi civilians were placed in an environment of fear and desperation and were forced to witness the killing and the severe injuring of friends, family

²¹¹ ICTR, *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Trial Chamber, Judgment, May 21, 1999

and other Tutsi civilians. The killings were brutal in manner. The people saw carnage and heard the people singing exterminate them, exterminate them...The Prosecutor submits that such an environment inherently causes serious mental harm.”²¹²

Although this assertion that serious mental harm is ‘inherently’ caused was not based on any mental health experts’ findings, the Trial Chamber adopted it in an unconditional way and posed it as stemming naturally from the described events. On these grounds, the judges noted that they were ‘in no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends....’²¹³ At the same time, the Trial Chamber did not provide the source of its certainty and did not cite any empirical knowledge or data referring to this or even other similar cases.

This ‘axiomatic’ approach of the Trial Chamber towards the psychological impact of the attack was criticized by the defendant’s lawyers who implied that the establishment of mental harm incurred to civilians with no specific medical certificates referring to such harm is arbitrary and goes against the defendant’s presumption of innocence.²¹⁴ Considering the fact that the assertion of the ‘inhumane acts’ parameter in Article 3 of the ICTR Statute refers only to ‘serious mental harm’, the determination of whether the inflicted mental harm was indeed serious or not becomes of cardinal importance.

²¹² Ibid, para.152

²¹³ Ibid, para.153

²¹⁴ On this account see the characteristic phrases used before the Tribunal by Kayishema’s defence such as ‘...before you take any interest in me, you should through concrete elements, through your medical certificates, demonstrate to the Tribunal that the inflictions, by themselves, that were made on the mental integrity of the group were designed to cause disappearance. How can a psychological shock bring about the disappearance of an individual? We should not just make sentences, we should not content ourselves with just sentences.’ ICTR, *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Trial Chamber, Redacted Transcript, November 12, 1998, p.142. See also *ibid.*, p.149

2.4 Warfare's Psychological Civilian Impact and the ICC

In the first case where an individual was convicted by the ICC, Thomas Lubanga Dyilo was found guilty for the crime of conscripting children and obliging them to participate in the hostilities that had erupted in the Democrat Republic of Congo.²¹⁵ In coming to discuss the harm caused to child soldiers from recruitment, the Trial Chamber referred explicitly to the serious trauma such practice caused to the affected children.²¹⁶ In order to reach such a conclusion, the Trial Chamber did take into account the opinion of a competent psychologist.²¹⁷ Nevertheless, the Trial Chamber proceeded in this assertion without further specifying the criteria upon which it had decided to declare this psychologist's opinion as admissible. In that sense, the Chamber failed to create a consistent policy of introducing such expert assessments in the judicial discussion of the psychological harm sustained by the victims. As a result, the lack of such criteria rendered the Trial Chamber's practice in *Lubanga* susceptible to review and non-sustenance in future judgments. In fact, this was the case that the ICC Trial Chamber, under a different composition, was called to discuss regarding the psychological suffering by civilians in the *Katanga* case.

In *Katanga*, the Prosecution had charged the defendants under Article 7(1)(k) for the crime of inhumane acts due to the 'intentional infliction of serious injuries upon civilians.'²¹⁸ The Pre-Trial Chamber specified these injuries as pertaining to the affected civilians' body and limbs. On the other hand, the Prosecution did not specify whether these injuries were physical or non-physical. In coming to find the defendants guilty for the causation of 'serious mental and physical harm' on these grounds, the Trial Chamber referred to how a woman, taken

²¹⁵ Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, 14 March 2012, para.1358

²¹⁶ *Ibid*

²¹⁷ *Ibid*, para.605

²¹⁸ Pre-Trial Chamber I, *Prosecutor v. Germain Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, para.22

captive, was raped several times and repeatedly assaulted. For its claim that such conduct brought mental harm to the victim that could be termed as ‘serious’, the Trial Chamber provided two references to the trial’s transcripts.²¹⁹ In coming to examine the sources, one sees that both of them relate to the witness’s recounting of the rape and her interrogation by soldiers once in captivity.²²⁰ These sources do not contain any reference to specific psychological harm suffered by the victim or to its seriousness. Thus, such harm was left to be deduced by the horrendous nature of the undertaken acts.

Furthermore, the Trial Chamber accepted the assertion of a village chief affected by Katanga’s crimes that those children violently conscripted to fight were ‘traumatized’ in order to deduce from such an assertion the conclusion that such trauma should be seen as a reason why one of these children soldiers denied, before the Court, any army participation.²²¹ In spite of the fact that both the witness assertion as well as the Court’s deduction contained strong elements pertaining to mental health sciences’ expertise, the Court did not resort to the aid of mental health experts in order to verify whether the claimed trauma of the children that appeared before the Court could be asserted.

2.5 The Lack of Reliable Standards in Judges’ Conclusions: The Impact for the Defendant’s Rights and the Integrity of the Judicial Process

Judges are meant to base their decisions on evidence and proven facts.²²² When it comes to expert witnesses, the ICC has, in essence, applied the principles of the Daubert standard,

²¹⁹ ICC, Trial Chamber II, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para.1006

²²⁰ *Prosecutor v. Katanga*, Transcript No.139, p.39, ICC-01/04-01/07-T-139-Red-ENG WT 11-05-2010 1/66 EA T

²²¹ ICC, Trial Chamber II, *Prosecutor v. Germain Katanga*, supra note 218, paras.1054-1055

²²² David Crowley-Buck, Unreasonable Reasonableness: Standardizing Procedural Norms of the ICC through Al Bashir, 34 B.C. Int’l. & Comp. L Rev. 15,21 (2011)

holding that in coming to evaluate these experts' testimonies, ICC judges are to review the experts' methodology and the general reliability of the expert evidence.²²³ Yet, as demonstrated in many instances, at least as far as warfare's psychological impact on civilians is concerned, the ICC judges do not resort to the aid of mental health witnesses in the first place. This is despite the fact that, when it comes generally to the aid expert witnesses provide to the judges, the ICC has emphasized the value expert witnesses have for the very acceptance by the Court of certain events as facts rather as just mere accounts. For example, in coming to depend in the *Katanga* case on witnesses rather than expert witnesses for the recounting of the historical background that gave rise to the conflict in the realm of which the defendant's crimes were committed, the Trial Chamber noted that

‘...the witnesses to whom the Chamber makes reference were above all protagonists in the conflict and their accounts can in no way be likened to that of an expert. The Chamber therefore wishes to emphasize that...this section does not constitute a body of findings of fact: it is simply an account, inevitably incomplete, that seeks to facilitate understanding of some aspects of the situation in the DRC and more particularly of the conflict which raged in Ituri at that time.’²²⁴

The question whether, when it comes specifically to issues pertaining to mental health sciences, such a reluctance on the part of the international criminal courts and tribunals to evaluate expert testimonies should be associated with an inherent institutional inability of these bodies to approach and assess such evidence will be explored in the next chapter. The current section will examine the effect such judicial reluctance has on the defendant's rights and the overall integrity of the judicial process itself. This is the case when matters pertaining to

²²³Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, supra note 214, para.127; ICC, Trial Chamber II, *Prosecutor v. Germain Katanga*, supra note 218, para.94

²²⁴ ICC, Trial Chamber II, *Prosecutor v. Germain Katanga*, ibid, para.430

warfare's psychological impact do not constitute matters of common knowledge that judges can take into account without reference to the evidence process.²²⁵ In other words, they constitute pronouncements on expert issues which cannot be undertaken without reliance on an expert authority. The next section will underline how the particular approach currently taken by international criminal courts and tribunals compromises the two aforementioned elements, namely defendants' rights and the integrity of the judicial process. It will start with the rights of the defendant and continue by addressing the issue of the general impact of the judicial practice on the integrity of the process.

2.6 The Current Judicial Approach and its Impact on the Rights of the Defendant

Scholars have noted that 'there has been relatively little interest in the rights of the accused before international criminal courts.'²²⁶ On these grounds, there is additional importance in addressing the way international criminal courts and tribunals determine how the psychological impact of warfare affects the rights of the defendants. The lack of reliable criteria in the formation of epistemological conclusions touches upon a number of issues which relate to a greater or lesser extent to the right of a fair trial. For example, such practice leads judges to issue non-reasoned judgments as far as the particular part is concerned. The need for judgments to be reasoned is a major cornerstone of modern legal orders which should be based on the rule of law and the absence of reasoning in court decisions violates the defendants' right to a fair trial.²²⁷ This should be viewed in light of the fact that such absence precludes hierarchically higher courts from reviewing the way the particular conclusions have been

²²⁵ See for example art. 69(6) of the Rome Statute

²²⁶ Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 *Yale J. Int'l. L.* 111,13312 (2002)

²²⁷ Ola Johan Settem, *APPLICATIONS OF THE FAIR HEARING' NORM IN ECHR ARTICLE 6(1) TO CIVIL PROCEEDINGS*, Springer (2016) 376-377

reached. This inability for appeal courts to review judgements ultimately gives rise to a situation where judges can formulate their conclusions arbitrarily without the ability to criticize and double-check these conclusions.²²⁸

Additionally, the lack of reliable standards affects the presumption of innocence that any defendant must enjoy. Through the current practice, international judges infer, on their own with no scientific support, the impact of certain acts and conclude that these acts cause serious mental harm and suffering to the affected civilians. Without the involvement of experts, depending on the existence of prejudices that judges may have in their assessment of the impact of these acts, there is the possibility that the resulting mental harm may not be of such magnitude that it is, in fact, 'serious.' In that sense, under the current judicial approach, there is greater chance of refusing to consider the defendant as possibly innocent, thus infringing upon the presumption of innocence.

To the extent that both the need for judgments to contain explicit reasons and be justified and the presumption of innocence relate to the right to a fair trial,²²⁹ there may be a possible violation of the right to a fair trial. Since the right to a fair trial is a cardinal one,²³⁰ the grounding of any legal conclusions on assertions made by judges without recourse to witnesses' testimonies constitutes a ground of appeal for the rendered judgment.

²²⁸ On this see Clelia Lacchi, Review by Constitutional Courts of the Obligation of National Courts of last instance to Refer a Preliminary Question to the Court of Justice of the EU, 16 German L. J. 1663,1682 (2015)

²²⁹ OSCE Mission to Bosnia and Herzegovina, The Presumption of Innocence: Instances of Violations of Internationally Recognized Human Rights Standards by Courts of Bosnia and Herzegovina, p.1 available at <http://www.osce.org/bih/110246?download=true>

²³⁰ On an overview of the entrenchment of the right to fair trial in legal documents from antiquity till our days see Patrick Robinson, The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY, 3 Berkeley J. Int'l. L. Publicist 1 (2009)

2.7 The Current Judicial Approach and its Impact on the Wider Integrity of the Judicial Process

The lack of reliable standards in the assessment of matters falling outside a judge's expertise when relying on their own cognitive facilities rather than on expert testimonies raises issues for the integrity of the judicial process on two levels. The one is procedural, relating to the fact that judges are not allowed to reach conclusions on expert issues on expertise knowledge attained in ways other than the introduction of relevant expert reports or opinions through the rules ordained by the criminal or civil procedure. The second is substantial and refers to the question of how judges can reach conclusions on the level of the incurred mental harm and that 'beyond reasonable doubt' the affected civilians have suffered 'serious mental harm,' without recourse to mental health experts.

When it comes to the first issue, domestic courts have highlighted it. In *Rowe v. Gibson*, a U.S. case, a dispute took place to the extent that the 7th Circuit of Appeal based its judgment on the fact that Judge Posner conducted research using the internet on his own initiative.²³¹ The case concerned the granting of summary judgment on the time an inmate in Indiana was allowed to take a pill for his stomach in his cell. Judge Posner, writing the majority's position, refuted the medical expert's testimony and relied on internet articles and sources that he himself found. Posner's stance was criticized by Judge Hamilton, his peer at the bench.²³² Scholars have also raised doubts as to whether this particular case could be cited for extracting general conclusions about allowing judges to draw on material not formally brought to the trial by the parties. Posner's approach, in *Rowe v. Gibson*, was meant to address specific problems

²³¹ *Rowe v. Gibson*, 798 F 3d 622,623 (7th Cir.2015). See also the US Supreme Court stance in the *Kulbricki* case where the Court reverses a Court of Appeals judgment reached through the appeal judges conducting an internet search on their own without though touching on the doctrinal issues such propio motu reliance on material bears for the judicial process. (*Maryland v. Kulbricki*, 577 US 1 (2015) (per curium). For the facts of the case see also Jules Epstein, Looking Backwards at Old Cases: When Science Moves Forward, 106 J. Criminal L. & Criminology 49,52-54 (2016)

²³² *Rowe v. Gibson*, ibid at 635-36 (Hamilton J. dissenting in part)

stemming in U.S. law from pro se litigation cases regarding whether the defendant could have his arguments heard before the court. Hence it is possible that no general conclusions regarding judges' discretion to resort to material not officially presented to the trial should be drawn from this case.²³³ This is especially valid given that Posner's stance on the issue was criticized by Judge Hamilton, his peer at the bench,²³⁴ and it has not been equally shared by other U.S. state courts²³⁵ or by courts in other jurisdictions such as Canada and Australia.

Similarly, in the *Bornyk* case before the Canadian courts, the question was whether a fingerprint found in a burgled house belonged to the defendant as a police fingerprint expert claimed.²³⁶ The trial judge relied on articles published generally on fingerprinting in order to refute the police officer's stance without calling the latter to defend his position in light of the reservations the articles casted on fingerprint analysis in general.²³⁷ The trial judge consequently proceeded to acquit Bornyk.²³⁸ However, the Crown appealed the decision citing as grounds of appeal, inter alia, the fact that the trial judge had relied on pieces of scientific literature that was not introduced to the trial by either party, was not tested in evidence, and was not put in the consideration of the testifying police officer.²³⁹ In coming to accept the appeal, the British Columbia Court of Appeal noted that judges were to rely, in principle only, on evidence presented throughout the trial.²⁴⁰ This had not happened in this particular case as far the reliance of the trial judge on published research was concerned. On these grounds, the

²³³ M.Cristina Martin, 'Googling' your way to Justice: How Judge Posner was (almost) correct in his Use of Internet Research in *Rowe v. Gibson*, 11 Seventh Circuit Review 1,30-31 (2015) available at <https://www.kentlaw.iit.edu/Documents/Academic%20Programs/7CR/v11-1/martin.pdf> (explaining how Judge Posner's stance was linked to the question of giving a pro-se litigant the opportunity to have his case heard in tandem with the equality of arms principle)

²³⁴ *Rowe v. Gibson*, supra note 767 at 635-36 (Hamilton J. dissenting in part)

²³⁵ On this see for example the stance of the Wisconsin Court of Appeals in *State v. Enriquez*, No. 2015AP1850-CR (Wis. Ct. App. July 27, 2016)

²³⁶ *R v. Bornyk*, Court of Appeal for British Columbia, 2015 BCCA 28, para.1 available at <http://www.courts.gov.bc.ca/jdb-txt/CA/15/00/2015BCCA0028.htm>

²³⁷ Ibid at para.4

²³⁸ Ibid at para.5

²³⁹ Ibid at para.6

²⁴⁰ Ibid at para.8

Court of Appeal criticized the trial judge for compromising ‘the appearance of judicial independence essential to a fair trial’ and proceeded to note that the trial judge ‘while he sought submissions on the material he had located, by the very act of his self-directed research...he assumed the multi-faceted role of advocate, witness and judge.’²⁴¹

In response to the *Bornyk* judgment, scholars have argued that the Court of Appeal ‘exaggerated the magnitude of the threat to fairness’ since it would have been more unfair if the trial judge had not taken any action at all in further raising and incorporating his concerns about the epistemological validity of fingerprint analysis in his final judgment.²⁴² In that sense, the Court of Appeal’s criticism of the trial judge’s stance and of these scholars who argued against the Court of Appeal judgment, relates to the way the scientific objections about the fingerprint analysis were introduced by the trial judge. Whereas, for the Court of Appeal, an expert witness should have been called to testify on account of the police officer expert’s testimony, the cited scholars thought that the trial judge could fetch the materials and contentions that cast doubts on the epistemological validity of fingerprint analysis on his own in the trial procedure.²⁴³ In both cases, however, both the Court of Appeal and the scholars agreed that the expert’s axiological conclusions on the fingerprint found in the house should be buttressed by relevant scientific evidence about fingerprint analysis as a method.

This stance is further articulated in the Australian jurisprudence, in a number of judgments issued by the Full Court of the Family Court.²⁴⁴ For example, in *Barclay & Orton*, the judge of first instance brought material relating to the interests of the child before the parties

²⁴¹ Ibid at para.11

²⁴² Gary Edmond et al., A little ignorance is a dangerous thing: Engaging with exogenous knowledge not adduced by the parties, 25 Griffith L. Rev. 383,397 (2016)

²⁴³ Ibid at 397-398

²⁴⁴ The Full Court is the appellate court of family courts in Australia. In certain instances it can decide also on appeals brought against a federal circuit court decision. On this see Family Court of Australia, Appeal Procedures-Full Court available at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/appeals/appeal-procedures-full-court>

in order to get their response on the scientific issues this material raised for the child's well-being. The Full Court stated, though, that while it was commendable for the judge to rely on scholarly articles in order to support his stance, he could not hand this scholarly material to the parties for their response.²⁴⁵

In the *McGregor* case, the federal judge relied on materials not brought in the trial by the parties in order to relate to the concept of 'parental alienation.'²⁴⁶ The Full Court rejected such an approach and disapproved of the fact that the particular articles the judge had relied on had become the prism through which the evidence was assessed.²⁴⁷ On these grounds, the federal judge's reliance on such material raised problems because it was not introduced into evidence and, ultimately, the approach represented 'a failure to afford the appellant natural justice and procedural fairness.'²⁴⁸ Similarly, in *X and X*, the Full Court held that the question whether genital herpes was incurable was not one of general knowledge and thus the judge was not entitled to provide an answer to it without the relevant scientific proof.²⁴⁹ In *KB & TC*, two children aged ten and twelve expressed the will to live in Japan with their father rather than in Australia with their mother.²⁵⁰ Due to the fact that the trial judge had balanced all of the relevant parameters,²⁵¹ the Full Court upheld the trial judge's decision to accept the children's volition to live with their father and further rendered clear that the question of the benefit that a child

²⁴⁵ *Barclay & Orton* [2009] FamCAFC 159 at 71

²⁴⁶ *McGregor & McGregor* [2012] FamCAFC 69

²⁴⁷ *Ibid* at 117

²⁴⁸ *Ibid* at 121

²⁴⁹ *X and X* (2000) FLC 93-017 cited in John Hamilton, *Objectionable Material in Affidavits*, 2008, p.13 available at <http://www.hvflpa.org.au/wp-content/uploads/2011/12/2008-Objectional-Material-in-Affidavits1.pdf>

²⁵⁰ J. Joy Cumming & Ralph Mawdsley, *Student Rights and Parent Rights in Education in Australia*, 10 *Australia and New Zealand Journal of Law & Education* 37,41 n.42 (2005)

²⁵¹ Australian Family Law Council, *Discussion Paper*, February 2006, p.13 available at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Discussion%20paper%20on%20Relocation%20February%202006.pdf>

would derive out of his relationship with his other siblings was not a matter of general knowledge and thus the judge should shape his conviction based on expert opinions.²⁵³

The second issue, namely the substantial hurdles that the non-reliance on experts fetches to the integrity of the trial through the non-sufficient delineation of the incurred mental harm as ‘serious,’ is equally important given the fact that international crimes need the intentional causation of such harm to be ‘serious’ in order to be asserted. In cases of incidental mental harm, assuming that such harm should be a parameter in the *jus in bello* proportionality balance that the military commander is called to conduct,²⁵⁴ mental health experts’ reports can provide an indication to the judges on whether the decision of the commander to proceed with a certain operation should be seen as reasonable based on the anticipated military advantage. This, to the extent that the need for such mental harm to be ‘serious’ in order to be able to outbalance any military advantage considerations, has been stressed by international scholars who have pointed out that the more severe the harm the less likely it is for any military considerations to prevail.²⁵⁵

For example, for David Luban, the lives of soldiers and enemy civilians are of an equal value and the proportionality test involves a ‘transfer of risks’ perception which should be a one-to-one ratio. This means that in a life or death situation, a soldier would only be permitted

²⁵³ *KB & TC* (2005) FamCA 458 at 87 (quoted in the presentation delivered by the Honourable Chief Justice Diana Bryant at the Judicial Conference of Australia colloquium). On this see Diana Bryant, The use of extrinsic materials-with particular reference to social science and family law decision making, Fremantle, Western Australia, 5-7 October 2012, p.11 available at http://jca.asn.au/wp-content/uploads/2013/11/Extrinsic-Materials_paper.pdf

²⁵⁴ For scholars stressing the role incidental civilian harm can play in *jus in bello* see Eliav Liebllich, *supra* note 28; Solon Solomon, Bringing Psychological Civilian Harm to the Forefront: Incidental Civilian Fear as Trauma in the case of Recurrent Attacks, EJIL!Talk, 25 April 2018 available at <https://www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incidental-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/> For an analysis of the *jus in bello* proportionality and its components see David Akerson, Applying *Jus in Bello* proportionality to Drone Warfare, 16 Oregon Rev. Int’l. L. 173 (2014)

²⁵⁵ Isabel Robinson & Ellen Nohle, Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas, 98(1) Int’l. Rev. Red Cross 107,130 (2016)

to kill one civilian in order to save the life of another fellow soldier.²⁵⁶ For Adil Ahmad Haque, the aim of the jus in bello proportionality is to avoid the causation of greater harm in warfare. Such a stance is meant to encompass excessive harm incurred not only to enemy civilians but also to a state's own civilians.²⁵⁷ While each stance is translated into different conclusions, the common denominator is the fact that excessive civilian harm cannot be justified by resorting to any arguments of military advantage.

The Rome Statute seems to hold likewise. In coming to delineate the proportionality equation, Article 8(2)(b)(iv) refers to civilian injury that is 'clearly excessive' rather than just 'excessive', as stipulated in the similarly worded Article 51(5)(b) of AP I and serious mental harm could be seen as such, especially when it relates to the emergence of trauma²⁵⁸ given that in forms of warfare like cyberwarfare, major instruments like the Tallinn Manual underline that the causation of severe mental suffering must be seen as being tantamount to injury.²⁵⁹ Reference to 'serious' injury caused to civilians has also been made by the ICC in cases of intentional attacks against civilians.²⁶⁰

International quasi-judicial bodies, such as fact-finding commissions have also associated the infliction of 'serious mental harm' with the bearing of international criminal repercussions and with the ICC involvement. Such an association has sometimes taken place explicitly in the relevant report conclusions or implicitly through the denouncement these bodies have put forth regarding the infliction of a certain degree of mental harm and suffering on civilians. This is palpably demonstrated in the various reports fact-finding bodies have

²⁵⁶ David Luban, Risk Taking and Force Protection in READING WALZER, Yitzhak Benbaji & Naomi Sussmann eds., 2014 (Routledge) 277

²⁵⁷ Adil Ahmad Haque, Law and Morality at War, Early Draft available at <https://www.law.upenn.edu/live/files/3010-haque-a-theory-of-jus-in-bello-proportionality-pdf>

²⁵⁸ Solon Solomon, supra note 254

²⁵⁹ Michael Schmitt, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, Cambridge University Press (2013) 108

²⁶⁰ Pre-Trial Chamber I, *Prosecutor v. Germain Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, para.270

penned at the backdrop of the Israeli-Palestinian conflict. On the other hand, the Schabas-Davis report, penned in the aftermath of an Israeli military operation in Gaza in 2014 on account of the rocket attacks launched by Hamas, opted to describe, in detail, the psychological symptoms experienced by both Israeli and Palestinian civilians in coming to substantiate their mental harm and the assertion of war crimes, referring to the need for an ICC investigation.²⁶¹ In its discussion of the conflict's psychological toll on civilians, the report mainly described cases of posttraumatic stress disorder and other stress-related symptoms.²⁶²

Although the report did not specify whether the mental harm suffered by these civilians could be termed as 'serious' or 'grave', the description of such harm based on mental disorder symptoms, implies that the answer should be in the affirmative. Yet, as long as international criminal law does not endorse scientifically reliable standards for evaluating such harm, its discussion is condemned to remain subjective and amorphous. To the extent that the delineation of the incurred psychological impact is important for the prosecution of certain acts, the inability of international criminal courts and tribunals to reliably assess it violates the legality principle and the fact that criminal rules must be as detailed as possible in order for individuals to know in advance which behaviour is allowed and which is denounced by criminal law.²⁶³ On these grounds, as scholars note,²⁶⁴ it is the role of the courts, through their interpretation of the various provisions, to let individuals know in advance whether certain behaviours are

²⁶¹ Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, paras.74,104, 560-561. On these grounds the severity of the caused mental harm to the Israeli civilians as described in the Schabas-Davis report should be read in conjunction with the Palmer report, penned by a UN fact-finding panel and authorizing Israel to exercise its right to self-defence on account of 'the psychological toll' suffered by the Israeli civilian population. On this see Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, para.71. See also Eliav Lieblich, *supra* note 29 at 192

²⁶² Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, para.563

²⁶³ Antonio Cassese et al., *CASSESE'S INTERNATIONAL CRIMINAL LAW*, Oxford University Press (3rd ed.,2013) 27-28

²⁶⁴ Ilias Bantekas & Lutz Oette, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE*, Cambridge University Press (2016) 727; Antonio Cassese et al., *CASSESE'S INTERNATIONAL CRIMINAL LAW*, Oxford University Press, (3rd ed.,2013) 28

denounced in the hope that such knowledge will deter them from contravening the law. Yet, even beyond the deterrence level, exact substantiation of the level of mental harm that needs to be incurred in order for the defendant to be convicted for his actions, is required also by the fact that convictions must come only once the facts upon which the indictment is based, have been proved ‘beyond reasonable doubt’. This ‘beyond reasonable doubt’ requirement is not served if the caused mental harm is not discussed on scientifically reliable grounds and it is this issue that will constitute the focus of the next section.

2.8 The Assessment of Warfare’s Psychological Impact and the ‘Beyond Reasonable Doubt’ Proof Requirement

The inability to properly define the extent of the caused mental harm leads to an inability of the courts to be led to conclusions ‘beyond reasonable doubt.’ This in turn raises the question of whether the produced judgments do bear the proper justifications. Ultimately, the objectives served by the evaluation of evidence methods, namely the lessening of any intrusion of subjective views in the judgment’s corpus, are served by the need for the judgments to be grounded on reasoned opinions and be consistent with the ‘beyond reasonable doubt’ requirement.²⁶⁵ In that sense, the ‘beyond reasonable doubt’ requirement links together the two issues cited above, namely the integrity of the judicial process and the proper definition of mental harm as one of its facets.

²⁶⁵ Mark Klamberg, EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS: CONFRONTING LEGAL GAPS AND THE RECONSTRUCTION OF DISPUTED EVENTS, Martinus Nijhoff Publishers (2013) 159

The need for the defendant's guilt to be established 'beyond reasonable doubt' exists both in common as well as continental law criminal jurisdictions.²⁶⁶ Common law systems refer explicitly to the particular standard in criminal law.²⁶⁷ Depending on the particular country, those following the civil law system have the creation of a 'full', 'reasoned', or 'intimidate' conviction as a standard of proof in criminal cases.²⁶⁸ While some scholars have argued that this should be deemed as different from the 'beyond reasonable doubt' standard, other scholars consider the two standards to be the same.²⁶⁹ The standard refers to the conviction created by the fact-finding party in a criminal trial, be it the jury or the judge, that the defendant's guilt is certain and that the prosecutor's recounting of the incriminating events constitutes the only reasonable way these events could have transpired.²⁷⁰

It is true that in some common law jurisdictions, the 'beyond reasonable doubt' standard' is not always required for mental health issues. This is the case with special defences when the defendant claims a mental health illness, such as insanity.²⁷¹ In these cases, it would

²⁶⁶ Jack Weinstein & Ian Dewsbury, Comment on the meaning of 'beyond reasonable doubt' 5 *Law, Probability & Risk* 167,172 (2006) (explaining the postulation of such a high onus of proof to the fact that 'the law prefers to see that guilty persons go free rather than an innocent be convicted'). For the international framework see art.66 of ICC Statute. See also Understanding the International Criminal Court, p.23 available at <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> ; Niamh Hayes, Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES, William Schabas et al. eds., Routledge (2013) 27, n.87

²⁶⁷ Mark Schweizer, The Civil Standard of Proof-What is it actually?, Preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2013/12, July 2013, p.2

²⁶⁸ For the fact that the difference in the semantics of the approach refer to the two main civil law jurisdictions, these of France and Germany see Stephen Thaman, Ensuring the Factual Reliability of Criminal Convictions: Reasoned Judgments or a Return to Formal Rules of Evidence? in COMPARATIVE CRIMINAL PROCEDURE, (Jacqueline Ross & Stephen Thaman eds.,2016) Elgar, 82-83

²⁶⁹ Antonio Cassese, CASSESE'S INTERNATIONAL CRIMINAL LAW, Oxford University Press (3rd ed., 2013) 384 (with reference to further sources). On this see also the pronouncement of the German Federal Supreme Court that 'in doubtful cases, the judge may and must be content with a degree of certainty useful for practical life that silences doubt without completely excluding it.' (Christof Wagner, DIE 'REGISTRIERTE' GESSELLSCHAFT BURGELICHEN RECHTS, Mohr Siebeck, Tübingen, 2014, 82-83). See also the formula endorsed by some of the judges of the U.S. Supreme Court, holding that 'proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt.' (Victor v. Nebraska, 511 US 1,27 (1994)

²⁷⁰ Christian Diesen, Beyond Reasonable Doubt: Standard of Proof and Evaluation of Evidence in Criminal Cases, 40 *Scandinavian Studies in Law-Legal Theory* (2000) 170

²⁷¹ Antonio Cassese, CASSESE'S INTERNATIONAL CRIMINAL LAW, supra note 268 at 384 n.99

be difficult for the prosecution to prove the opposite, namely that the defendant is not insane. For this reason, while the prosecution, generally, has to prove truthfulness of its claim of ‘beyond reasonable doubt’, in this particular instance, the burden of proof falls on the defence.²⁷² In this occasion, acknowledging the fact that in mental illness and other psychiatric conditions one cannot always talk with certainties, the law requires ‘clear and convincing evidence’ rather than a standard of proof ‘beyond reasonable doubt.’ While such an arrangement is found in common law provisions, for example Rule 850(a)(b) of the US Uniform Code of Military Justice, this shift in the burden of proof is not allowed by the ICC Statute.²⁷³ Moreover, the ‘beyond reasonable doubt’ standard continues to be applicable in cases pertaining to mental health matters outside the special criminal defences’ framework. This is the case with the mental harm incurred by the victims.

Along these lines, the international criminal courts and tribunals have resorted to the ‘beyond reasonable doubt’ standard in a number of cases. In several instances in *Blaskic*, the ICTY Trial Chamber stated that it was brought to a certain conclusion ‘beyond reasonable doubt.’ This was the case when questioning whether certain attacks against some villages had any military objectives or whether they were carried out merely to attack the Bosnian Muslim population of these villages.²⁷⁴ It was equally the case once the tribunal was called to pronounce a stance on whether Blaskic knew about the international humanitarian law violations that took place on account of these events. The Trial Chamber held that ‘it was persuaded beyond all reasonable doubt that General Blaskic had reason to know that violations of international humanitarian law were being perpetrated.’²⁷⁵

²⁷² Ibid

²⁷³ ICC Statute, art.67(1)(i)

²⁷⁴ ICTY, *Prosecutor v. Blaskic*, Trial Chamber, Judgment, IT-95-14-T, March 3 2000, para.410 (noting that ‘the Trial Chamber is therefore convinced beyond reasonable doubt that no military objective justified these attacks’). See *ibid*, para.425

²⁷⁵ *Ibid* at para.733

Similarly, in *Blagojevic*, the ICTY referred to the formation of its judgment ‘beyond all doubt.’ In *Jelusic*, the Trial Chamber did not reach the conviction that the defendant had the intent to commit genocide ‘beyond reasonable doubt’ and thus he was acquitted of any genocide charges despite the number of his victims.²⁷⁶ In *Martic*, the Trial Chamber acquitted Milan Martić of the crime of persecution because it did not find ‘beyond reasonable doubt’ that the defendant wanted to commit the attacks he was accused of which included the constant shelling of Croatian cities.²⁷⁷ In *Limaj*, the defendant was acquitted because prosecution did not establish ‘beyond reasonable doubt’ that Limaj had command or effective control over a prisoners’ camp or over the relevant soldiers who were guarding it.²⁷⁸ Finally, in *Akayesu*, the ICTR held that it was persuaded ‘beyond a reasonable doubt’ that the defendant had threatened to kill a woman on two occasions during her interrogation.²⁷⁹

The certainty the ‘beyond reasonable doubt’ standard imposes does not mean that the issue has to be proven ‘beyond the shadow of a doubt.’²⁸⁰ Rather, reliance on the ‘beyond reasonable doubt’ standard means reliance on the subjective view of the deciding judge.²⁸¹ In *Delalic*, the ICTY held that ‘a reasonable doubt is a doubt which the particular jury entertains in the circumstances’²⁸² and this utterance is seen as depicting the subjective facets the standard entails.²⁸³ The same is also true regarding the structure of the ‘intimate conviction’ in civil law

²⁷⁶ ICTY, *Prosecutor v. Jelusic*, Trial Chamber, Judgment, IT-95-10-T, Dec.14,1999, para.108. See also *ibid.*, para.95

²⁷⁷ ICTY, *Prosecutor v. Martić*, Trial Chamber, Judgment, IT-95-11-T, 12 June 2007, para.473. On these grounds see also ICTY, Appeals Chamber, *Prosecutor v. Oric*, IT-03-68-A, Judgment, 3 July 2008, para.189

²⁷⁸ ICTY, *Prosecutor v. Limaj et als*, Trial Chamber, Judgment, IT-03-66-T, November 30, 2005, para.601

²⁷⁹ ICTR, *Prosecutor v. Akayeshu*, Trial Chamber I, Judgment, ICTR-96-4-T, September 2, 1998, para.711. See also *id.*, para.724

²⁸⁰ Antonio Cassese, CASSESE’S INTERNATIONAL CRIMINAL LAW, *supra* note 268 at 384

²⁸¹ Mark Schweizer, The Civil Standard of Proof-What is it actually?, Preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2013/12, July 2013, p.3

²⁸² ICTY, *Prosecutor v. Delalic*, Trial Chamber, Judgment, IT-96-21-PT, February 21, 1997, para.10

²⁸³ Geert-Jan Alexander Kooops, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW, 2nd ed., Martinus Nijhoff Publishers (2nd ed., 2008), 260

jurisdictions.²⁸⁴ Additionally, the ‘beyond reasonable doubt’ standard means that an alternate factual scenario that differs from that conceded by the court or tribunal cannot be possible.²⁸⁵ In that sense, the rationale behind the ‘beyond reasonable doubt’ standard is that while the impact of any subjective views cannot be obliterated, it is nevertheless less stark once the particular standard of proof is required.²⁸⁶

It is important to note that the ‘beyond reasonable doubt’ standard must be tied to the existence of an evidence evaluation method. In other words, for the prosecution to assert that the ‘beyond reasonable doubt’ standard is the only way events could have happened, there must be concrete and firmly accepted evidence that things could not have taken an alternate course.²⁸⁷ Such concrete and firm evidence is entrenched through the adoption of an evidence evaluation method²⁸⁸ that can, as well, ultimately reduce the danger of judges projecting their subjective beliefs upon their judgments.²⁸⁹

In cases pertaining to warfare’s psychological toll on civilians, *Haradinaj* illustrates the effect of a lack of any reliable standards on the assertion of the ‘beyond reasonable doubt’ standard. In this case, Lahi Brahimaj, one of the defendants convicted for the serious mental harm he had inflicted on one of his victims, argued before the Appeals Chamber that the Trial Chamber had erred in accepting the infliction of such physical and mental pain since the victim himself had not stated that he had experienced such pain and mental trauma from the cruel treatment he was subject to.²⁹⁰ The Prosecution, on the other hand, argued that this pain and

²⁸⁴ Stephen Thaman, Ensuring the Factual Reliability of Criminal Convictions: Reasoned Judgments or a Return to Formal Rules of Evidence? in *COMPARATIVE CRIMINAL PROCEDURE*, Jacqueline Ross & Stephen Thaman eds., Elgar, 2016, 82

²⁸⁵ Antonio Cassese, *CASSESE’S INTERNATIONAL CRIMINAL LAW*, supra note 804 at 384 (with further references)

²⁸⁶ Mark Schweizer, The Civil Standard of Proof-What is it actually?, Preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2013/12, July 2013, p.3

²⁸⁷ Christian Diesen, Beyond Reasonable Doubt: Standard of Proof and Evaluation of Evidence in Criminal Cases, 40 *Scandinavian Studies in Law-Legal Theory* (2000) 171

²⁸⁸ Ibid

²⁸⁹ Mark Klamberg, supra note 264 at 159

²⁹⁰ ICTY, Appeals Chamber, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgment, July 19, 2010, para.354

trauma should be inferred by the nature of the beatings and the torturing of the victim.²⁹¹ The Trial Chamber sided with the Prosecution by considering the physical and mental trauma suffered and still being felt according to the judges as well as the lasting physical consequences from the beatings and the related ongoing mental trauma.²⁹² The Appeals Chamber consequently proceeded to uphold Brahimaj's conviction.²⁹³

It has been argued that judges have two ways of evaluating evidence, namely a mathematical one that involves statistical analysis²⁹⁴ and a non-mathematical one that uses psychological or cognitive methods.²⁹⁵ It has been further argued that when it comes to the question of how the 'beyond reasonable doubt' standard is to be expressed, non-mathematical approaches should be the starting point of the analysis.²⁹⁶ Thus, when establishing a 'beyond reasonable doubt' standard for the psychological impact of warfare, there is additional value for the courts and tribunals to rely on mental health expert pronouncements that are based on social sciences or medical knowledge. In other words, judges should not base their judgments on 'an intuitive holistic evaluation'²⁹⁷ rather than on firm grounds. In the past, this led to the substitution of the jury with professional judges in domestic criminal cases.²⁹⁸ It is argued, however, that in international criminal cases, there should be inclusion of forensic scientists and mental health experts instead of substitution of the jury.

²⁹¹ Ibid, para.355

²⁹² Ibid, para.356

²⁹³ Ibid., para.377

²⁹⁴ For the use of such statistical analysis in coming to evaluate evidence around crimes of sexual violence see Xabier Agirre Aranburu, *Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases*, 23 *Leiden J. Int'l. L.* 609, 623 (2010)

²⁹⁵ Mark Klamberg, *supra* note 264 at 158

²⁹⁶ Ibid

²⁹⁷ Ibid at 159

²⁹⁸ Stephen Thaman, *Ensuring the Factual Reliability of Criminal Convictions: Reasoned Judgments or a Return to Formal Rules of Evidence?* in *COMPARATIVE CRIMINAL PROCEDURE*, Jacqueline Ross & Stephen Thaman eds., Elgar (2016) 83

2.9 International criminal courts and the mental harm discussion impact on domestic war crimes trials

The need for international criminal courts and tribunals to define the psychological impact of warfare using reliable scientific standards is indicated by the fact that, on many occasions, the lack of such standards on an international level leads domestic judges to totally obliterate any need to examine whether the inflicted terror also caused ‘serious mental harm.’ Thus, in coming to try possible war crimes, domestic judges often find it sufficient to state that an event caused terror to civilians without justifying how or why they reached this conclusion.

On these grounds, the juxtaposition of the ICTY judgments discussed above to judgments rendered by Bosnian and Croatian national courts regarding war crimes during the Yugoslav civil war, can be provided as an example of a case-study relevant framework. Although this jurisprudence is not vast, it points to the fact that, as is the case with international criminal courts and tribunals, domestic courts of countries that have emerged from the civil war in Yugoslav have come to treat the psychological impact of warfare on civilians without referring to mental health expert opinions.

As far as Bosnian courts are concerned, the case of Kurtovic is indicative. Kurtovic was indicted for applying ‘measures of intimidation and terror.’²⁹⁹ In particular, he obliged his prisoners to eat pages of prayer books and touch a live wire under voltage with their bare hands, and ordered his prisoners to lower their heads to the floor while keeping their hands above their head, something that, as recorded in the judicial decision, caused pain and ‘immense fear’ among the particular civilians. The judgment included the testimony of one of the witnesses who described that due to events he experienced, he suffered from poor sleep. Moreover he

²⁹⁹ Bosnia and Herzegovina Court, *Kurtovic* case, Judgment, Aug. 27, 2007, p.p. 1-2, 8, 10, 13, 28

constantly pictured the past events in his mind, he had become more aggressive, and he had problems with his adrenal levels.³⁰⁰ The Court did not address these civilians' symptoms at all or even consider whether they indicated war trauma or denoted the infliction of 'serious mental harm.' The Court found Kurtovic guilty for the crime of terrorizing civilians without even discussing the level of fear these civilians had experienced. Given that international criminal jurisprudence has held that only 'extreme fear' constitutes terror,³⁰¹ determination of the level of fear created would have legal significance in this particular case. Of note, it would be crucial to determine this level through the aid of mental health experts.³⁰²

Similar questions and approaches regarding warfare's psychological impact were raised before Croatian courts in the case of Jankovic, who was indicted for incidents and acts that led to the inhumane treatment and terrorization of his victims.³⁰³ Here, the Court noted an incident where the defendant shot about twenty shots before the feet of his civilian victim to the extent that, as the judgment notes, the civilian 'froze in fear' 'psychologically entrenching into herself.' However, the Court did not further evaluate legally or attach any importance to whether there was an infliction of 'serious mental harm' or not. It could be argued that lack of reliance on scientific reliable criteria rendered the Court unqualified to properly undertake such stance and that the interests of justice would be better served if mental health experts had been called to testify as expert witnesses.

³⁰⁰ Ibid, p.8

³⁰¹ On this see Julinda Beqiraj, *Terror and Terrorism in Armed Conflicts: Developments in international criminal law in WAR CRIMES AND THE CONDUCT OF HOSTILITIES: CHALLENGES TO ADJUDICATION AND INVESTIGATION* (Fausto Pocar et al., eds. Edward Elgar Publishing, 2013) 270

³⁰² In that sense, see the striking factual similarity with the case of *Haradinaj*, where the KLA soldiers under the orders of the defendant forced civilians 'to eat a small plastic-coated book', yet in the case of *Haradinaj* the indictment did not include any charges of terrorization of the civilian population. On this see *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Fourth Amended Indictment, October 16, 2007, para.54

³⁰³ Sibenik County Court, *Croatia v. Jankovic*, K-7/09, Judgment, Sept. 24, 2010, p.p.1-2,3, counts 3,5 and 8, p.15 available at http://www.documenta.hr/assets/files/Sudjenja/sudjenja/Presuda_S_I_24.09.2010..pdf

2.10 Conclusion

The current chapter sketched the inconsistent manner that international criminal courts and tribunals have used so far to determine the extent of warfare's psychological impact on civilians. It stressed how international criminal judges assess the psychological harm inflicted upon the civilians without considering the opinions of mental health experts at all or just considering them in a general sense. The chapter proceeded to demonstrate the problems created by such a judicial practice both regarding the assurance of the verdict's quality and certainty as well as the defendant's human rights standards. Lastly, it discussed how such a practice on an international level also impacts the way domestic courts come to discuss the psychological impact of warfare based on general utterances and without resorting to further scientific evidence. In that sense, having sketched the problems entailed in the current approach of the international criminal judges towards warfare's psychological civilian impact, the next chapter will turn to the thesis suggestion of addressing the issue through the introduction of the Daubert standard by exploring the cardinal question of whether the Daubert standard can be introduced in the first place in international criminal law as a general principle.

Chapter 3: Addressing the Inconsistency: The Assessment of Warfare's Psychological Civilian Impact and the Question of Whether an International Criminal Law Principle can be Established

3.1 Introduction

While the previous chapter illustrated the inconsistency with which international criminal law deals with the psychological impact of warfare on civilians, one can ask if international criminal law *de lege lata* provides the tools to the judge to address the issue. International criminal law does not provide a consistent answer either to the question of how expert evidence is to be assessed or to the question preceding it, namely whether international criminal judges have to resort to experts in the first place. The instruments governing the function of international criminal tribunals such as the ICTY and the ICTR,³⁰⁴ acknowledged the fact that expert witnesses might be called but at the same time and adopting the free probative value of evidence, held that this expert evidence could be assessed at will by the judge.³⁰⁵ At the same time, echoing the Daubert reliability precept, the procedural rules governing these tribunals held that no evidence would be admissible if obtained by methods which cast a substantial doubt on its reliability.³⁰⁶

As far as the ICC is concerned, Regulation 44 stipulates that the Court is to draft a list of experts from which expert witnesses are to be drawn.³⁰⁷ Yet, the ICC Regulations do not

³⁰⁴ On this see art.14 of the ICTR Statute

³⁰⁵ ICTR Rules of Procedure, Rules 89(C) and 90(D)

³⁰⁶ Kimberley Miles, Memorandum for the Office of the Prosecutor, Issue: Expert Witnesses, New England School of Law, War Crimes Prosecution Project, Fall 2001, p.3 available at <http://www.nesl.edu/userfiles/file/wcmemos/2001/miles.pdf>

³⁰⁷ On this see Rule 95 of the ICTR Rules of Procedure; Regulations of the Court adopted by the Judges of the Court on 26 May 2004, fifth plenary session, The Hague, 17-28 May 2004, ICC-BD/01-01-04

elaborate further on how these witnesses' testimonies are to be evaluated. Whereas Regulation 44(5) holds that it is the Chamber that may issue an order not only regarding the subject of the expert's report, but also regarding the way the expert's evidence is to be presented³⁰⁸ exerting great control over how the expert's report is to be also drafted,³⁰⁹ the ICC Regulations do not elaborate on how these reports are to be assessed or on whether resort to an expert should be compulsory in the first place. In that sense, any potential for the Daubert standard to be introduced into international criminal law should be seen as lying in the auspices of the ICC Statute and the way the various legal precepts come to become part of international criminal law. Along these lines, article 21 of the ICC Statute stipulates that

The Court shall apply:

- a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence
- b) In the second phase, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict
- c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Based on this provision and given that there is no guidance on the issue by the ICC Statute, the Elements of Crimes, or the Rules of Procedure and Evidence, and that one cannot

³⁰⁸ Regulations of the Court adopted by the Judges of the Court on 26 May 2004, fifth plenary session, The Hague, 17-28 May 2004, ICC-BD/01-01-04

³⁰⁹ Katrin Olof Einarsson, Comparing the Rules of Evidence Applicable before the ICTY, ICTR and the ICC, 2010, 96 available at http://skemman.is/stream/get/1946/4226/12225/1/1_fixed.pdf

point to the existence of a custom, it is only if deemed to be a general principle that the Daubert standard reliability precept can be seen as forming part of international criminal law. This generates the question of what conditions need to be in place in order for a general principle to be declared as a source of law on one hand in public international law in general and consequently in international criminal law.

3.2 The General Principles of Law as a Source of International Law

The introduction of the general principles of law as a source of international law dates back to at least the 19th century and relevant arbitral awards.³¹⁰ However, it took a more conspicuous place in the international law discourse in the first half of the 20th century in the realm of the Permanent Court of Justice,³¹¹ and immediately triggered a number of questions. Article 38 of its Statute, repeated after World War II in the ICJ Statute,³¹² the successor of the Permanent Court of Justice, made a reference to ‘the general principles of law recognized by civilized nations.’ Such reference raised in turn the question of whether ‘uncivilized’ nations existed.³¹³ Along these lines, scholars criticized the particular phraseology for embedding a pre-World War II standard in a post-World War II document.³¹⁴

³¹⁰ On this, see Fabian Raimondo, *GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS*, Martinus Nijhoff Publishers (2008) 10-15

³¹¹ Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURT AND TRIBUNALS*, Cambridge University Press (1953) 2,21

³¹² ICJ Statute, art.38; Bin Cheng, *ibid* at 21

³¹³ On this see Cherif Bassiouni, *A Functional Approach to ‘General Principles’ of International Law*, 11 *Michigan J. Int’l. L.* 769,773-74 (1989-1990) (holding that all UN members today are considered to be civilized)

³¹⁴ But see also the approach of scholars who have opted to link this civilizing requirement with the question of whether or not a country partakes in the free market model and endorses market-oriented reforms. On this see Alan Audi, *Iraq’s New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law*, 93 *Geo. L. J.* 335,338-39 (2004)

Moreover, scholars debated whether these general principles should be viewed as related to natural law, seen primarily as principles stemming from international law and, on an auxiliary basis, from the domestic legal systems or considered to have originated from national domestic law.³¹⁵ As well, there were disagreements as to whether such principles should be deemed to be interpretational, non-binding tools used to interpret treaty and customary law, or binding³¹⁶ and meant to fill *lacunae* in international law.³¹⁷ In fact, in coming to include the general principles as a source of international law, the drafters of the Permanent Court of Justice's Statute appeared to be aware of the incomplete character of treaty and customary law, at least at the time of the Statute's drafting. Due to this, general principles seemed to be used to address situations of a *non liquet*, restricting, in turn, the use of any self-devised rules by international judges.³¹⁸

The scholarly debate was sustained inter alia by the fact that international law instruments do not provide a relevant list of these principles.³¹⁹ At the same time, the question whether a notion constitutes such a principle or not is tied to the principle's nature, without though its public or private law character playing a difference as suggested by Lauterpacht.³²⁰

³¹⁵ Bin Cheng, *supra* note 311 at 2-3, 9 (noting interesting that the word 'nation' in the provision seems to imply the concept of a nation as a group of people, not necessarily confined in state, national frontiers). See on this also Mosler's view that the general principles are to be seen as domestic principles which nevertheless apply in international law under an 'international law' hat. (Herman Mosler, *General Principles of Law*, 2 *Encyclopaedia of Public International Law* 513,519, Max Planck Institute for Comparative Public Law and International Law, 1999). Oscar Schachter summarizes very well the whole dispute by including in such general principles both 'principles of municipal law that are recognized by civilized nations' as well as 'principles that are derived from the unique character of the international community'. On this see Oscar Schachter, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, Martinus Nijhoff (1991) 50-53. For a discussion of Schachter's categorization see Neha Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 57 *Harvard Int'l. L. J.* 111,117-120 (2016)

³¹⁶ Bin Cheng, *supra* note 311 at 4-5

³¹⁷ Wolfgang Friedmann, *The Uses of 'General Principles' in the Development of International Law*, 57 *Am. J. int'l. L.* 279,280 (1963)

³¹⁸ Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, *DROIT INTERNATIONAL PUBLIC*, Librairie Generale de droit et de jurisprudence (2nd ed.,1980) 312

³¹⁹ Marci Hoffman & Robert Berring Jr., *INTERNATIONAL LEGAL RESEARCH IN A NUTSHELL*, West Academic Publishing (2nd ed.,2017) 82

³²⁰ Wolfgang Friedmann, *supra* note 317 at 281

Rather, what is important is whether the norm, as noted,³²¹ ‘emerges from the universal practice of States in *foro domestico*’ and entails fundamental principles³²² meant to be crystalized by customary and treaty law.³²³

Such universal application of the principles should not mean that international law is indeed an ‘international’ body of norms that undertakes a homogenous, identical attitude towards various issues.³²⁴ For example, already from the 1970s, the impact of Latin American or Asian African law was noted.³²⁵ While nowadays the fall of socialism has minimized any influences of Marxist or socialist approaches to law, non-western influences continue to be present³²⁶ aside any influences traditionally cast by the English or the French legal orders as the main representatives of the common and continental law legal traditions.³²⁷

Moreover, a principle must not apply in an identical way in order to be considered as ‘general’. What suffices is that it demonstrates an ability to ensure the maximum agreement in the way national jurisdictions look at certain issues.³²⁸ In order to find whether such an

³²¹ On this, see Portugal’s submission to the ICJ in the Right to Passage case cited by the Court in Case Concerning Right to Passage over Indian Territory (Merits), Judgment of 12 April 1960, ICJ Rep.1960, p.6,9

³²² Neha Jain, *supra* note 314 at 119; Mark Jenis, INTRODUCTION TO INTERNATIONAL LAW, Aspen Law & Business (3rd ed.,1999) 55-56; Cherif Bassiouni, *supra* note 520 at 770 (referring to Bin Chen’s assertion that general principles are principles that are ‘cardinal’). See also Schlesinger referring to ‘a core of legal ideas which are common to all civilized systems’ at Rudolph Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations, 51 American J. Int’l. L. 734,739 (1957)

³²³ Case Concerning Right to Passage over Indian Territory (Merits), Judgment of 12 April 1960, ICJ Rep.1960, p.123, 139-140,para.45 (Dissenting Opinion of Judge Fernandes) (citing Verdross)

³²⁴ Anthea Roberts et al., Comparative International Law: Framing the Field, 109 Am. J. Int’l. L. 467 (2015)

³²⁵ On this see ICJ, Barcelona Traction Light and Power Company Limited, Judgment, ICJ Rep.1970 at 3,290, para.5 (Separate Opinion of Judge Ammoun)

³²⁶ The existence of such different legal approaches may raise doubts as to whether these principles are endorsed by ‘a community of nations’ as required by certain international documents in order for these principles to be considered ‘general principles of international law’. On this see for example article 15.2 of the International Covenant on Civil and Political Rights.

³²⁷ Edward Glaeser & Andrei Shleifer, Legal Origins, Quarterly Journal of Economics 1193,n.1 (2002). The study of Glaeser and Shleifer conducted in 2002 found that among the civil procedure systems of 109 countries, 42 countries followed the common law tradition and 40 the French civil law tradition. If the number of the countries that followed the German civil law tradition is also added, the final number of countries ultimately influenced either by the common law or the civil law model is even bigger. On this account see also the fact that international criminal courts and tribunals have referred to Romano-Germanic and the Common law family as the two main legal families in coming to relate to the general principles pertaining to ‘all nations’ or ‘the nations of the world’ (Fabian Raimondo, *supra* note 45 at 393,400)

³²⁸ Wolfgang Friedmann, *supra* note 316 at 284

agreement exists, the interpreter of law engages into a comparative analysis and examines whether the underlined principle exists in national legal systems.³²⁹ When it does, it is presumed that the principle as a general principle of law can fill any gaps that exist in international law³³⁰ in areas where the law is insufficient, obscure, or imperfect.³³¹ The question that arises though is whether the judge is entitled to resort to this general principles gap-filling mode in all cases or he has to give preponderance to the application of treaty and custom.³³²

The idea that treaty and custom have to be preceded in any *lacunae* filling quest, has led to the view that resort to the general principles is sometimes a form of judicial activism to the extent that such principles are considered sources of international law only on a default basis when customary or treaty law does not apply.³³³ In that sense, although Article 38 of the ICJ Statute does not establish a hierarchy between the different international law sources and general principles can apply simultaneously with custom and treaty,³³⁴ it is assumed that the search for the relevant applicable norm will follow the order that the provision establishes. The interpreter of law will first examine whether a custom or treaty applies and will resort to the general principles only when it does not.³³⁵ Such an approach is true particularly when it comes to international criminal law³³⁶ as will be delineated in the next subsection.

³²⁹ For the fact that this was the way pursued by Portugal also in the Right to Passage case before the ICJ see Case Concerning Right to Passage over Indian Territory (Merits), Judgment of 12 April 1960, ICJ Rep.1960, p.123, 136, para.34 (Dissenting Opinion of Judge Fernandes)

³³⁰ Mark Jenis, supra note 321 at 55-56; Fabian Raimondo, supra note 310 at 7

³³¹ Neha Jain, supra note 315 at 113

³³² Ibid at 114

³³³ Maria Panezi, Sources of Law in Transition: Re-visiting General Principles of International Law, *Ancilla Iuris* 66, 72 92007). For the fact that the U.S. practice concurs with this see Restatement (Third) of Foreign Relations Law, para.102 (1987)

³³⁴ Case Concerning Right to Passage over Indian Territory (Merits), Judgment of 12 April 1960, ICJ Rep.1960, p.123, 140, para.45 (Dissenting Opinion of Judge Fernandes) (citing De Visscher); Fabian Raimondo, supra note 309 at 20

³³⁵ Mark Jenis, supra note 321 at 55-56; Herman Mosler, General Principles of Law, 2 *Encyclopaedia of Public International Law* 513,518, Max Planck Institute for Comparative Public Law and International Law, 1999)

³³⁶ Jonatan Thormundsson, The sources of international criminal law with reference to the human rights principles of domestic criminal law, 39 *Scandinavian Studies in Law*, 387,388 (2000)

3.3 The General Principles of Law as a Source of International Criminal Law

Article 21 of the ICC Statute bears similarities in its wording to article 38 of the ICJ Statute when it comes to the role general principles play. As a branch of public international law, it should not be surprising that also international criminal law draws its sources from customary law, treaties, and the general principles of law.³³⁷ The latter have been seen as ‘sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant common points.’³³⁸

Yet, this transplantation of the Article 38 hierarchy in the ICC Statute should not be seen as following the arrangement contained also in the Statutes of the Tribunals preceding the ICC. To the contrary, none of these Statutes contained any reference to the general principles as a source of international criminal law.³³⁹ The lack of any previous provision models as well as the fact that in some instances the Tribunals mentioned in their judgments the general principles in a rather in a confusing way³⁴⁰ may explain how, in the Rome Statute, the notion of ‘principles’ did not merit a clearer treatment. The nebulous landscape around the concept of general principles may be aggravated by the fact that the general principles of international criminal law are cited in Subsection (c) following reference to treaty and customary law³⁴¹ indicating that they are clearly seen as a subsidiary source of international criminal law.³⁴²

³³⁷ Fabian Raimondo, *supra* note 310 at 393

³³⁸ Antonio Cassese, *INTERNATIONAL LAW*, Oxford University Press (2001) 151

³³⁹ Neha Jain, *supra* note 315 at 120-121; Ciara Damgaard, *INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES*, Springer (2008) 47

³⁴⁰ ICTY, *Prosecutor v. Kupreskic*, IT-95-16-T, Judgment, 14 January 2000, para.591 (the ICTY mentioning as sources ‘the general principles of international criminal law’ and in absence of these, the ‘general principles of criminal law common to the major legal systems of the world’ or lacking such principles, resort to the ‘general principles of law consonant with the basic requirements of international justice.’)

³⁴¹ At the same time it has been noted that international criminal law does not follow the article 38 of the ICJ Statute treaty-custom-general principles hierarchy to the extent that the Statutes of international tribunals such as the ICTY placed customary law at the same level as treaty law and did not award any priority to the latter as a source of law. On this see Mia Swart, *Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and ‘Adventurous Interpretation’*, 70 *ZaoRV* 459, 463 (2010)

³⁴² Fabian Raimondo, *supra* note 310 at 102

Nevertheless, this does not mean that their importance in the wider international criminal law framework should be deemed as minimal. On the contrary, even more than in other fields of international law, general principles are considered to be playing an important role in the development of international criminal rules.³⁴³

This has been portrayed historically in the role that these principles have played in international criminal trials as far back as the post-World War II trials.³⁴⁴ In the Nuremberg trials of the Nazi criminals, this role was stressed *inter alia* also on account of the arguments that the defendants posed. Wanting to take advantage of the lack of any international criminal code predating the war, the defendants argued that they could not be tried for crimes against peace and humanity. They based their argument on the legality principle found in criminal law which stipulates that a person can only be held criminally responsible if his acts are criminally punishable by law at the time they take place.³⁴⁵ However, the Nuremberg International Military Tribunal refuted their argument and the judges stressed that the legality principle should not be seen as just a general principle of criminal law, but rather as a general principle of justice, embedded with a moral content.³⁴⁶ Under this lens and along the precepts of natural

³⁴³ Neha Jain, *supra* note 315 at 116

³⁴⁴ For the fact that the Nuremberg International Military Tribunal should be seen as the first international criminal tribunal in modern history see Fabian Raimondo, *supra* note 310 at 75

³⁴⁵ Fabian Raimondo, *ibid* at 77-78; Sergey Vasiliev, *The Making of International Criminal Law* in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, (Catherine Brolmann & Yannick Radi eds., 2016) Edward Elgar Publishing, 368

³⁴⁶ International Military Tribunal: Judgment, 1947, p.444 cited in INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT, Appendix 5, 52-53, Vol. 3, Cherif Bassiouni ed., Martinus Nijhoff, (3rd ed., 2008); Jonatan Thormundsson, *The sources of international criminal law with reference to the human rights principles of domestic criminal law*, 39 Scandinavian Studies in Law, 387, 390 (2000); on the question of whether the legality principle can be deemed to be a general principle of international criminal law see Dov Jacobs, *A Tale of Four Illusions: The Rights of the Defense before International Criminal Tribunals* in DEFENSE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE, Colleen Rohan & Gentian Zyberi eds., Cambridge University Press (2017) 565 (noting that the principle exists in all modern and democratic criminal law systems as well as in the international human rights documents)

justice,³⁴⁷ the judges held that the legality principle was entrusted with not permitting the reign of injustice that would take place if the crimes of the defendants were left unpunished.³⁴⁸

Moreover, aside from embedding the legality principle with a moral content through resort to the general principles of law, the judges also aimed to substantiate the prosecution of the defendants for crimes conducted throughout the war. This is because, according to the Tribunal, the law of war was not to be found only in treaty rules, rather, but rather also in custom and ‘from the general principles of justice applied by jurists and practiced by military courts.’³⁴⁹ The general principles of law were equally cited by the Nuremberg International Military Tribunal in order to refute the defendants’ argument that they were just obeying orders when they committed the various crimes³⁵⁰ and in order for the Tribunal to establish that criminal responsibility should be viewed on an individual basis according to a ‘well-settled principle’ so that mass punishments could not be sanctioned.³⁵¹

The International Military Tribunal for the Far East, instituted to try the crimes committed by the Japanese during World War II, largely followed the jurisprudential path set by the Nuremberg International Military Tribunal.³⁵² This related also to the relevant pronouncements regarding the role that general principles could play in the establishment of criminal responsibility.³⁵³ While the International Military Tribunal for the Far East did not examine cases entailing the argument that the defendants were just obeying orders, reference

³⁴⁷ Robert Cryer, *International criminal justice in historical context: the post-Second World War trials and modern international criminal justice* in *INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE*, Gideon Boas et al. eds., 2012, Edward Elgar Publishing, 155

³⁴⁸ International Military Tribunal: Judgment, 1947, p.444 cited in *INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT*, Appendix 5, 52-53, Vol. III, Cherif Bassiouni ed., 3rd ed., Martinus Nijhoff, 2008

³⁴⁹ International Military Tribunal: Judgment, 1947 cited in Igor Ivanovich Lukashuk, *Crimes against Peace in THE NUREMBERG TRIAL AND INTERNATIONAL LAW*, George Ginsburgs & V.N. Kudriavtsev eds., Martinus Nijhoff, 1990, 149; *Annual Digest and Reports of Public International Law cases*, Hersch Lauterpacht ed., Butterworth & Co. Publishers, 1951, 209

³⁵⁰ Fabian Raimondo, *supra* note 310 at 79-80

³⁵¹ *Ibid* at 80

³⁵² *Ibid* at 83

³⁵³ *Ibid*

to the general principles was made along the lines posed by the Nuremberg International Military Tribunal regarding the *nullum crimen* principle and the defendants' arguments that their behaviour was not criminalized at the time their acts were committed.³⁵⁴ This use of general principles by international criminal courts and tribunals to emphasize certain precepts that are considered basic can also be found in the jurisprudence of other courts and tribunals. The relevant analysis can thus be epimerized according to each court or tribunal.

More close chronologically to the ICC, international criminal courts and tribunals and most notably the ICTY, have equally awarded a major role to the general principles.³⁵⁵ At the same time, given that the ICTY analysis takes place on generalized grounds rather than through explicit reference to particular legal systems, scholars have convincingly argued that international criminal tribunals largely failed to put forth a coherent methodology according to which they assess whether a principle constitutes a general principle of law.³⁵⁶

For example, in *Tadic*, the ICTY had to resort to the general principles in order to decide whether or not it could sustain the defence argument that there was a violation of a relevant general principle since the Tribunal had not been established by law. According to the defence, international human rights documents rendered clear that the right to a fair trial should entail trial by a competent, independent, and impartial tribunal established by law and that the ICTY did not meet this requirement because it had been established by a UN Security Council Resolution.³⁵⁷ The Appeals Chamber held that this requirement constituted a general principle of law, even though it had a different meaning in domestic jurisdictions than in international

³⁵⁴ Ibid

³⁵⁵ On this see Fabian Raimondo, supra note 310 at 83-163 (counting and analysing 18 such decisions for the ICTY compared to 3 for the ICTR, 3 for the SCSL and 3 for the ICC. The discussion in the realm of this thesis refers to the most characteristic, path-leading cases. For a reference to every case where the ICTY dealt with the issue of general principles even on similar legal grounds see Raimondo *ibid*)

³⁵⁶ Ilias Bantekas, Reflections on some Sources and Methods of International Criminal and Humanitarian Law, 6 Int'l. Crim. L. Rev. 121, 129 (2006)

³⁵⁷ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-941-AR72, Second Appeals Chamber, 2 October 1995, paras.26-27

law which does not have the classical partition of power in executive, legislative, and judiciary branches.³⁵⁸ Along these lines, the general principle was interpreted not as precluding the establishment of a tribunal by the UN Security Council, but rather as demanding that international trials follow international human rights' law fairness standards.³⁵⁹

This need for international criminal courts and tribunals to examine whether a particular norm can also be transplanted into international law can be seen in a number of other cases decided by the ICTY. For example, in *Delalic*,³⁶⁰ Esad Landszo, one of the defendants, claimed before the ICTY Appeals Chamber that his diminished responsibility at the time he committed the crimes for which he was sentenced should be a ground for his acquittal.³⁶¹ In order to substantiate his claims, the defendant claimed that the role of diminished responsibility leading to his acquittal was established as a general principle in a number of domestic criminal jurisdictions.³⁶²

In coming to refute Landzo's argument, the Appeals Chamber conducted an examination of various common law and continental law criminal systems and concluded that diminished responsibility as a general principle referred to the mitigation of a sentence rather than to the question of a defendant's acquittal.³⁶³ Additionally, in *Kordic*, in having to decide whether self-defence could constitute grounds for excluding criminal responsibility, the ICTY judges examined the concept of 'defences' as put forth in the national criminal codes and found

³⁵⁸ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-941-AR72, Appeals Chamber II, 2 October 1995, paras.42-43

³⁵⁹ *Ibid* at 45. But see also James Crawford correctly pointing out that the article 14 of the ICCPR reference to judicial bodies 'established by law,' which served as a basis for the Appeal Chamber's fair trial discussion encompasses the obligation both for a court to be established according to a procedure prescribed by law as well as adhere to human rights standards. James Crawford, *The Drafting of the Rome Statute in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* (Philippe Sands, Cambridge University Press, 2003, 129-133). For a similar view to that expressed by Crawford see also Fabian Raimondo, *supra* note 310 at 90

³⁶⁰ ICTY, Appeals Chamber, *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgment, 20 February 2001

³⁶¹ *Ibid*, para.583

³⁶² *Ibid*, paras.583-584

³⁶³ *Ibid*, para.590

the concept to ‘form part of the general principles of criminal law that the International Tribunal must take into account in deciding the cases before it.’³⁶⁴

At the same time, in the ICTY jurisprudence, general principles of law have also been the foundation upon which international norms have come to rest even though international judges do not always specify on which national jurisdictions they rely in order to reach such a pronouncement. For example, in *Tadic*, Judge Sidhwa held that, according to most national jurisdictions, ‘no appeal lies unless conferred by statute’.³⁶⁵ Whereas through such reference the Judge could make a strong case about the need for appeals to be based on Statutes rather than mere judicial decisions,³⁶⁶ the fact that he did not refer to specific legal systems³⁶⁷ arguably weakened his point.

Similarly, in *Erdemovic*,³⁶⁸ the Trial Chamber dismissed duress as grounds for excluding criminal responsibility³⁶⁹ based on ‘the general principles of law as expressed in numerous national laws and case law.’ Yet, apart from a reference to the French legal order,³⁷⁰ the Trial Chamber did not specify to which national jurisdictions it was referring.³⁷¹ In the same case, the judges referred to domestic law in order to conclude that there existed ‘a general principle of law common to all nations’ according to which crimes against humanity were subject to the most severe sentences.³⁷² Yet, they did not specify which national legal systems

³⁶⁴ ICTY, Trial Chamber, *Prosecutor v. Koridc et al.*, IT-95-14/2-T, Judgment, 26 February 2001, para.449

³⁶⁵ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-941-AR72, 2 October 1995, para.6

³⁶⁶ Fabian Raimondo, *supra* note 310 at 91, n.365

³⁶⁷ *Ibid*

³⁶⁸ ICTY, Trial Chamber I, *Prosecutor v. Erdemovic*, Sentencing Judgment, IT-96-22-T, 29 November 1996, para.19

³⁶⁹ Fabian Raimondo, *supra* note 310 at 100

³⁷⁰ For a criticism of the ICTY’s reliance to the French jurisdiction as a sole reference see Andre Nollkaemper, *Decisions of National Courts as Sources of International Law: An analysis of the Practice of the ICTY in INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE-LAW OF THE ICTY*, Gideon Boas & William Schabas eds., Martinus Nijhoff Publishers (2003) 394

³⁷¹ Fabian Raimondo, *supra* note 310 at 96

³⁷² ICTY, *Prosecutor v. Erdemovic*, Trial Chamber, IT-96-22-T, Sentencing Judgment, 29 November 1996, para.31. For criticism of the implications the Trial Chamber drew from such a conclusion see Fabian Raimondo, *supra* note 310 at 98

they relied on to reach such a pronouncement.³⁷³ In *Delalic*, the Trial Chamber held that ‘it is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects.’ Yet, it did not refer to any national jurisdictions to buttress the deriving of such a general principle apart from that of the USA.³⁷⁴

In other instances, the ICTY has resorted to the general principles of law to further buttress notions contained in its Statute. Thus for example, in *Blaskic*, the Trial Chamber mentioned the general principles of criminal law regarding the criminal responsibility of individuals participating in the commission of crimes, although such responsibility is already established under Article 7(1) of the ICTY Statute.³⁷⁵ Similarly, in the same case, the ICTY referred to the proportionality principle as a ‘general principle of criminal law’, together with Article 24(2) of the ICTY Statute which came to explicitly introduce the principle in the tribunal’s proceedings.³⁷⁶ In *Kunarac*, the Trial Chamber stressed the fact that it had applied the presumption of innocence to the accused, not only according to Article 21(3) of the ICTY Statute, but also as a general principle of law.³⁷⁷ In this particular case, the Trial Chamber held that the prosecution had the onus to prove the defendant’s guilt ‘beyond reasonable doubt’ and such an obligation stemmed not only from the Tribunal’s Rules of Procedure, but also from the fact that the ‘beyond reasonable doubt’ evidentiary requirement constituted a general principle of law.³⁷⁸

³⁷³ For criticism of this judicial stance see Antonio Cassese, *The Contribution of the International Criminal Tribunal for the former Yugoslavia to the Ascertainment of General Principles of Law* recognized by the Community of Nations in *INTERNATIONAL LAW IN THE POST-COLD WAR WORLD*, Sienho Yee & Tieya Wang eds., Routledge (2001) 48; Fabian Raimondo, *supra* note 310 at 98

³⁷⁴ ICTY, Trial Chamber, *Prosecutor v. Delalic et al.*, IT-96-21-T, Judgment, 16 November 1998, para.424; Fabian Raimondo, *supra* note 517 at 110

³⁷⁵ ICTY, Trial Chamber, *Prosecutor v. Blaskic*, IT-95-14-T, Judgment, 3 March 2000, para.264

³⁷⁶ *Ibid*, para.796

³⁷⁷ ICTY, Trial Chamber, *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, para.559

³⁷⁸ *Ibid*

At the same time, there have been cases where the ICTY has resorted to the general principles of law also in order to decipher whether a certain act or initiative is sanctioned or frowned upon by international criminal law. For example, in *Furundzija*, the judges delved into the national legal systems in order to examine whether there was a general principle of law that could hold that rape included the oral penetration of the penis in the victim's mouth. Failing to find that such act was defined as 'rape' in national jurisdictions, the judges held that such conduct still fulfilled the requirements of the international crime of 'rape' due to the fact that it harmed the victim's dignity that should be protected during warfare both by the laws of war and human rights law.³⁷⁹ In the *Tadic* case, Judge Nieto-Navia relied on the comparative analysis of different domestic jurisdictions—continental law countries did not view the defendant's retrial after acquittal as a violation of the principle of *non bis in idem* whereas common law countries did—in order to conclude that he could not find a general principle preventing the prosecution from appealing the defendant's acquittal.³⁸⁰

Whereas the general principles of law have been referred to also by other international criminal courts and tribunals like the Special Court for Sierra Leone or the ICTR,³⁸¹ in most cases,³⁸² these courts and tribunals have cited the general principles, examining issues already dealt in the ICTY jurisprudence, such as whether the Trial Chamber can decide on a legal issue based on the testimony of one witness, or the establishment of concepts such as those of individual responsibility or of the presumption of innocence.³⁸³ In that sense, for the scholar

³⁷⁹ ICTY, Trial Chamber II, *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, 10 December 1998, para.183; Fabian Raimondo, supra note 517 at 112-115. On this see also the criticism of Bantekas on the fact that the Trial Chamber resorted to general principles of international law to endorse a conclusion that ran contrary to that extracted from the domestic legal systems. (Ilias Bantekas, Reflections on some Sources and Methods of International Criminal and Humanitarian Law, 6 int'l. Crim. L. Rev. 121, 126-129 (2006))

³⁸⁰ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Judgment, Declaration of Judge Nieto-Navia, IT-94-1-A, 15 July 1999, paras.3-9

³⁸¹ On this see Fabian Raimondo, supra note 310 at 143-163

³⁸² See for example the *Sesay* case where the SCSL established that according to a general principle of law, the accused must be always tried in his presence. (Fabian Raimondo, ibid at 162)

³⁸³ For a comprehensive analysis of the relevant cases see Fabian Raimondo, ibid at 143-163

who wants to trace the development of the concept of general principles through the jurisprudence of international criminal courts and tribunals, the ICTR or the Special Court for Sierra Leone , with a few notable exceptions,³⁸⁴ do not offer many insights.³⁸⁵

This historical background of how general principles have been treated so far in international criminal law makes the juxtaposition between Articles 21 and 38 justified and expected. General principles of law can be also a source of international criminal law if their precepts can be found in a number of different, representative jurisdictions across the globe. On this account, as is the case with its counterpart in Article 38, Article 21 c) does not only call for a numerical but also for a qualitative universalism to the extent that these principles must be universal because they introduce basic precepts common to humanity's legal conscience and are representative of what law is on a global scale.

3.4 Conclusion

According to the ICC Statute, the general principles of law is one way for a norm to become a source of international criminal law. In absence of any relevant treaty or custom, the assertion that the Daubert standard can constitute such general principle is the most feasible way to argue for its potential to be introduced as a norm in international criminal law. This preconditioned a discussion on the role general principles play in public international law in general and in international criminal law in particular, something which the current chapter aspired to do. It was demonstrated how such general principles can be used in order to fill

³⁸⁴ For an example of a case where recourse to the general principles of law offers such insights and raises questions see the SCSL Trial Chamber *Norman* case and Raimondo's relevant analysis in Fabian Raimondo, *ibid* at 161

³⁸⁵ Fabian Raimondo, *supra* note 45 at 399

lacunae in law on a *de lege ferenda* basis. To the extent that international criminal law does not currently contain any arrangements on when expert opinions are to be sought or how they are to be assessed, it can be argued that resort to the general principles' norm-begetting function can be a suitable vehicle for addressing the issue. On this account, what needs to be asked and explored is whether the Dauber standard and its requirement that judicial holdings on expert issues must be based on reliable scientific opinions can be seen as a general principle of law, rampant in most common law and continental law jurisdictions in order to be consequently considered also as a general principle of international criminal law. This task of mapping the Daubert standard reliability precept in the legal orders around the globe will be undertaken in chapters 5 and 6. In the meantime, the next chapter will discuss the inception and the evolution of the Daubert standard in the U.S. jurisdiction.

Chapter 4: *The Daubert Standard in the U.S. Legal Order*

4.1 Introduction

Daubert is a standard that emerged in the U.S. legal order. Its essence cannot be seen as detached from the wider precepts governing the law of evidence in U.S. law. As well, it is an example of a common law jurisdiction applying the adversarial system in criminal proceedings.³⁸⁶ Whether a country follows the adversarial or inquisitorial system or not is affected by its deep historical roots in the way justice came to be distributed in Europe throughout the centuries. In continental Europe, most notably in countries such as France, Spain, or Germany, judges were central figures who continued to have major absolute roles in the distribution of justice and were considered to be similar to kings or emperors. This was not the case for juries. In England, however, the introduction of common law as the amalgam of various customs and laws pronounced as legally binding by judges came to answer the question of ‘what is law’ mostly through stressing the role of the people rather than that of the king or emperor. On this account, the role of the jury became important and the judge was seen as someone meant to decide on the parties’ claims. Yet, it was the parties themselves who, based on the orality principle, had to present their claims before the judge and the jury and convince them that they were true. Thus, it has been argued, that the adversarial system should be defined as ‘a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive.’³⁸⁷

³⁸⁶ On this UK Parliament, House of Commons Committee on Science and Technology Seventh Report, March 16, 2005, para.146 available at

<https://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/96/9610.htm>

³⁸⁷ Mirjan Damaska, *EVIDENCE LAW ADRIFT*, Yale University Press (1997) 74

The question of whether a country follows the inquisitorial or the adversarial system in its criminal procedure directly impacts how expert evidence is introduced and assessed. In inquisitorial law countries, this task is entrusted to the judge who calls on the experts to testify out of a list already available to the court,³⁸⁸ whereas in adversarial systems it is the parties that call in their own experts. In the latter case, the judge does not have a way to verify in advance that the parties will indeed resort to reliable experts and will not just opt to furnish an opinion or report written someone of questionable academic or scientific stance because it aligns with the parties' arguments. In instances where expert bias is highly possible, unless the judge develops criteria to review the expert's opinion on his or her own, there is the risk of adopting unequivocally the expert's conclusions,³⁸⁹ turning the latter in a co-decider,³⁹⁰ thus undermining the rule of law and judicial independence. Not surprisingly, adversarial bias was cited as one of the reasons *Daubert* was pronounced.³⁹¹ It is inside this general legal contour that the *Frye-Daubert* debate should be placed, mirroring the efforts of the U.S. courts to put criteria in order to guide the judge regarding the admissibility of expert evidence.³⁹²

4.2 The Daubert Standard: Essence and Origins

In order to trace the origins of the Daubert standard precepts, it could be argued that one would need to go back to the 14th century and the introduction of juries in trials before the U.S. courts. Juries were often 'persons specially qualified to pass judgment in a particular

³⁸⁸ Elisabetta Grande, Italian Criminal Justice: Borrowing and Resistance, 48 Am. J. Comp. L. 227,247 (2000); Marijke Malsch & Ian Freckelton, Expert Bias and Partisanship: A Comparison between Australia and the Netherlands, 11 Psychology, Public Policy, Law 42 (2005)

³⁸⁹ Mauricio Duce, Admisibilidad de la Prueba en Juicios Orales: Un Modelo para Armar en la Jurisprudencia Nacional, Revista Institucional de la Defensa Publica, December 2011, 57, 58-59 available at <http://www.pensamientopenal.com.ar/system/files/2012/03/doctrina33402.pdf>

³⁹⁰ For the fact that this can lead to erroneous judicial decisions see Duce, *ibid* at 60

³⁹¹ David Bernstein, Expert Witnesses, Adversarial Bias and the (Partial) Failure of the Daubert Revolution, 93 Iowa L. Rev. 101, 103 (2008)

³⁹² Mauricio Duce, La Prueba Pericial y su Admisibilidad a Juicio Oral en el Nuevo Proceso Penal, 5 Revista de Ciencias Penales Iter Criminis (2006) 53 available at <https://edoc.site/prueba-pericial-mauricio-duce-pdf-free.html>

case',³⁹³ but since this was not always the case, judges were often entitled to summon expert witnesses. Contrary to the rest of the witnesses, expert witnesses were expected to pronounce their stance on issues that the court or the jury were to decide upon.³⁹⁴ In this case, it was the judges who decided whether these experts' testimonies should be passed to the jury.

This 'gatekeeping' role of the judges changed in the 17th century. By then, courts started permitting the parties to bring their own experts in as witnesses and the expert information was put directly to the consideration of the jury with no filtering intervention by the judges.³⁹⁵ The fact that the parties could bring in expert evidence led to a proliferation of the relevant material and started raising questions about its scientific reliability. The crucial criterion of whether the court would admit as evidence such testimony was whether the expert witnesses were qualified as experts in their fields with no reference to the scientific credibility of their reports.³⁹⁶ What mattered was whether the expert witnesses could make a living in their professions and fields of expertise.³⁹⁷ Due to the fact that each time courts decided on a case-to case basis whether an expert's testimony would be admitted as evidence rather than employing a general admissibility test,³⁹⁸ the assessment mode of expert evidence caused inconsistency and unpredictability.³⁹⁹

Already in 1901, as noted by Judge Learned Hand, the debate was not about whether or not expert knowledge should be used, and instead, was about how courts could best use it as

³⁹³ Lloyd Rosenthal, The Development of the Use of Expert Testimony, 2 L. & Cont. Problems (1935) 403,407

³⁹⁴ *Conn. Mut. Life Ins. Co. v. Lathrop* 111 U.S. 612,618 (1884); *Spring Co. v. Edgar* 99 U.S. 645, 657 (1878); *Transportation Line v. Hope* 95 U.S. 297,298-299 (1877)

³⁹⁵ Jason Kerkmans & Lyn Gaudet, Daubert on the Brain: How New Mexico's Daubert standard should Inform its Handling of Neuroimaging Evidence, 46 New Mexico L. Rev. 383, 384-85 (2016)

³⁹⁶ *Spring Co. v. Edgar*, supra note 394 at 658

³⁹⁷ *The Schooner Catharine v. Dickinson* 58 U.S. 170,175 (1854); David Faigman et al., Check your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present and Worrying about the Future of Scientific Evidence, 15 Cardozo L. Rev. 1799, 1804 (1994)

³⁹⁸ *Chateaugay Ore & Iron Co. v. Blake*, 144 U.S. 476,484 (1892)

³⁹⁹ Mark Lewis & Mark Kitrick, *Kumho Tire Co. v. Carmichael*: Blowout from the Overinflation of Daubert v. Merrell Dow Pharmaceuticals, 31 U. Tol. L. Rev. 79,80 (1999)

an aid in the settling of disputes.⁴⁰⁰ Yet, the U.S. jurisprudence did not provide an answer on this. By placing the emphasis on the reliability of the experts themselves and their qualifications, there was no room for any discussion of the reliability of the provided opinions.

This vacuum in the treatment and assessment of expert evidence was addressed in 1923 when the D.C. Federal Circuit Court of Appeals framed the *Frye* standard. In the *Frye* case, from where the name of the standard is derived, the Court had to decide whether results of a systolic blood pressure deception test—which is, in fact, the precursor of the polygraph test—should be proclaimed as admissible evidence.⁴⁰¹ *Frye*, appealing a second-degree murder conviction, argued that his expert should have been permitted to testify on the results of a lie detector test that showed that *Frye* was innocent.⁴⁰² Echoing the stance of the courts till that point, *Frye* argued that if the question before the court did not lie in the sphere of common knowledge, the opinions of witnesses skilled in a related science, art, or trade should be rendered admissible. The Court disagreed. The judges deemed that it was not enough for the expert witnesses to be qualified in their fields; their conclusions needed to be based on the general principles of science.⁴⁰³ In that sense, coming to address the experts' opinion's reliability, *Frye* introduced what came to be known as the 'general acceptance rule.'⁴⁰⁴

In the decades that followed, *Frye* was treated with mixed feelings among scholars and judges. On one hand, those that viewed *Frye* positively pointed out to the fact that it provided uniformity and certainty among judges on how to evaluate evidence beyond their expertise and

⁴⁰⁰ Learned Hand, Historical and Practical Considerations regarding Expert Testimony, 15 Harvard L. Rev. 40 (1901)

⁴⁰¹ *Frye v. United States* 293 F. 1013 (D.C.Circ. 1923)

⁴⁰² Jason Kerkmans & Lyn Gaudet, supra note 395 at 385

⁴⁰³ *Frye*, supra note 401 at 1014. In the words of the court what matters is if 'the thing from which the deduction is made' is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'

⁴⁰⁴ Sophia Gatowski et al., Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a post-Daubert World, 25 Law & Human Behavior 433,436 (2001); Stephen Odgers & James Richardson, Keeping Bad Science out of the Courtroom-Changes in American and Australian Expert Evidence Law, 18 UNSW L. J. 108,113 (1995)

constituted a firm jurisprudential line with consistency in decision-making.⁴⁰⁵ In truth, the Frye standard was more convenient for judges because it held that the latter's task was not the understanding of the scientific debates, but the mere surveillance of the scientific world.⁴⁰⁶ Additionally, *Frye*'s requirement that the provided opinion should be shared by the majority of the scientific community meant that a large number of scientists could be called to testify before courts without fears that their testimonies would be ultimately challenged as unreliable.⁴⁰⁷ On the other hand, *Frye*'s critics referred to the fact that the standard allowed judges to relinquish the judicial responsibility of pronouncing over the issues in a trial to the experts, including those that pertained to expert knowledge.⁴⁰⁸ Ultimately, returning to Hand's view stated above, a judge should be aided by experts, but not substituted for by them. Scientific knowledge was portrayed as a very wide and deep sea in which the judge should learn how to swim.⁴⁰⁹ Yet, it was doubtful whether *Frye* gave judges the tools and the ability to engage in such an endeavour.

Frye showed that there was a need for the provided scientific evidence to enjoy 'general acceptance', but did not equally define what constituted such an acceptance or the width and scope of the scientific field and knowledge upon which such 'general acceptance' would apply.⁴¹⁰ Without being able to further check the scientific validity themselves,⁴¹¹ courts could

⁴⁰⁵ Janusz Puzniak, *Expert Evidence: The Road from Daubert to Joiner and Kumho Tire*, Ct. Rev. (2000) 33. See also *United States v. Addison*, 498 F.2d, 741, 744 (D.C. Cir. 1974) (the Court noting that the Frye standard 'assures that those most qualified to assess the general validity of a scientific method will have the determinative voice');

JL Brown, *DNA and Kelly-Frye: Who will survive in California?* 11 *Crim. Just. J.* 1, 27 (1988)

⁴⁰⁶ Jay Kesan, *An Autopsy of Scientific Evidence in a post-Daubert world*, 84 *Geo. L. J.* 1985, 1990-1991 (1996); *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110(4) *Harvard L. Rev.* 941, 942 (1997)

⁴⁰⁷ Paul C. Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States: A Half Century Later*, 80 *Columbia L. Rev.* 1197, 1207 (1980)

⁴⁰⁸ Bert Black, *A Unified Theory of Scientific Evidence*, 56 *Fordham L. Rev.* 595, 632 (1988); Jay Kesan, *supra* note 651 at 1991; *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978) (noting that 'whatever the scientific 'voting' pattern may be, the courts cannot in any event surrender to scientists the responsibility for determining the reliability of that evidence')

⁴⁰⁹ David Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 *Hastings L. J.* 579 (1995)

⁴¹⁰ Paul C. Gianelli, *supra* note 407 at 1210-11, 1250

⁴¹¹ Jason Kerkmans & Lyn Gaudet, *supra* note 395 at 385-86

be easily persuaded by experts that the latter's conclusions were also generally accepted in their scientific fields. Given that experts were called by the parties to bolster certain narratives, it is questionable whether such scientific validity was necessarily always seen.⁴¹² Along these lines, and in relation to the reliability question, scholars emphasized the need for some kind of judicial screening to be established.⁴¹³

The scholarly criticism of *Frye* ultimately took a toll on the doctrine.⁴¹⁴ Buttressed by the fact that, in some instances after the adoption of the Federal Rules of Evidence in the 70s, the U.S. courts had voiced the stance that *Frye* should be set aside,⁴¹⁵ the U.S. Supreme Court signalled in 1993, the turning point was the judgment in the *Daubert v. Merrell Dow Pharmaceuticals* case.⁴¹⁶ In this case, the judgment must be seen as part of a wider chain of relevant cases against the anti-nausea drug Bendectin and its alleged harmful effects to public health.⁴¹⁷ As well in the realm of this case, in some instances, the U.S. courts had vindicated plaintiffs by admitting as evidence that expert testimony was based on scientific reasoning supported by published literature even if such reasoning did not constitute the prevailing view among scientists.⁴¹⁸

In the *Daubert* case,⁴¹⁹ Jason Daubert and Eric Schuller, the plaintiffs, were born with serious birth defects and sued Merrel Dow Pharmaceuticals arguing that Bendectin had caused

⁴¹² Paul C. Giannelli, *supra* note 407 at 1250

⁴¹³ Michael Jacobs, Testing the Assumptions underlying the Debate about Scientific Evidence: A Closer Look at Juror 'Incompetence' and Scientific 'Objectivity', 25 Conn. L. Rev. 1083,1083-1084 n.3 (1993) (with further references there)

⁴¹⁴ Michael Jacobs, *ibid* at 1083-1084; Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110(4) Harvard L. Rev. 941, 944 (1997) (noting that the Congress passing of the Federal Rules of Procedure in 1975 played also a role in the U.S. Supreme Court ultimately abandoning the *Frye* standard)

⁴¹⁵ See for example *United States v. Williams*, 583 F2d 1194,1198-99 (2d Cir.1978) (concluding that *Frye* is superseded by the Rules of Evidence); *State v. Hall*, Iowa 297 NW 2d 80,84 (1981); Stephen Odgers & James Richardson, *supra* note 404 at 114

⁴¹⁶ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

⁴¹⁷ For a discussion of the litigation history concerning Bendectin see Gary Edmond & David Mercer, The Secret Life of (Mass)Torts: 'The Bendectin Litigation' and the Construction of Law-Sciences Knowledge, 20(3) University of New South Wales L. J. 666 (1997)

⁴¹⁸ On this, see *DeLuca v. Merrell Dow Pharmaceuticals Inc.*, 911 F2d 941,957 (3rd Cir 1990)

⁴¹⁹ For a discussion of the case and its history see Petra van Kampen & Hans Nijboer, *Daubert in the Lowlands*, UC Davis L. Rev. 951,959-960 (1997)

their congenital limb reduction defects.⁴²⁰ Both sides submitted affidavits to substantiate their respective claims regarding the question of whether Bendectin was indeed the cause of these defects.⁴²¹ The district court held that the plaintiffs relied on studies that were insufficient in proving their claims since the scientific evidence that these studies embalmed ran contrary to an ‘overwhelming body of contradictory epidemiological evidence.’⁴²² The Ninth Circuit did not focus on the factual insufficiency of the provided scientific evidence as the district court had done, but to their admissibility.⁴²³ The court cited the ‘general acceptance’ of the Frye standard in order to ultimately conclude that the plaintiffs’ presented scientific evidence on the connection between Bendectin and the defects sustained that could not be admitted as evidence.⁴²⁴

The U.S. Supreme Court held otherwise. Its rationale against the upholding of *Frye* was based on the fact that the Frye standard originated from jurisprudence. In that sense, it could not override the stipulations on expert evidence contained in the Federal Rules of Evidence which were enacted in 1975.⁴²⁵ At the time *Daubert* was pronounced, Rule 702 read

‘Testimony of Experts: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.’

In that sense, albeit not explicitly, the question of the opinion’s reliability became interweaved with that of the opinion’s utility. As correctly noted

⁴²⁰ Margaret Berger, Procedural Paradigms for Applying the Daubert test, 78 Minn. L. Rev. 1345,1347 (1993-1994)

⁴²¹ Ibid

⁴²² *Daubert v. Merrell Dow Pharmaceuticals*, 727 F.Supp.570,573

⁴²³ *Daubert v. Merrell Dow Pharmaceuticals*, 951 F. 2d 1128 (9th Cir.1991)

⁴²⁴ Ibid at 1131

⁴²⁵ *Daubert v. Merrell Dow Pharmaceuticals*, supra note 416

“to determine whether the expert’s testimony about scientific knowledge will assist the trier of fact....Daubert requires the judge to ask two questions: ‘whether the reasoning or methodology underlying the testimony is scientifically valid’ and ‘whether that reason or methodology properly can be applied to the facts in issue.’”⁴²⁶

Along these lines, the court held that under Rule 702 the trial judge should ensure that all of the admitted evidence was not only relevant but also reliable. The court interpreted that the provision’s reference to ‘scientific knowledge’ includes knowledge that does not refer to ‘subjective belief’ or ‘unsupported speculation’, but rather is based on scientific methods and is, thus, considered to be reliable.⁴²⁷ This connection between reliability and admissibility, as envisioned in Rule 702, prompted the court to put aside the Frye standard in favour of a new one, the ‘Daubert standard’, after the name of the case. According to the Daubert standard, expert opinions were to be deemed admissible if they were penned by a competent expert; incorporated scientific knowledge; were relevant to the facts of the case; were indeed needed to elucidate these facts and; were based on a scientifically-reliable method.

However, the court did not proceed to define what constitutes such a ‘scientifically reliable method’ and did not provide ‘a definite checklist or test.’⁴²⁸ Nevertheless, echoing previous federal courts’ jurisprudence,⁴²⁹ the U.S. Supreme Court articulated some parameters the judges could take into account in coming to evaluate the scientific reliability of a certain approach including the following: a) the question of ‘falsification,’ meaning whether a theory can be tested; b) ‘the known or potential rate of error’ of the particular scientific technique or theory; c) whether such theory or technique has been the subject of ‘peer review and

⁴²⁶ Margaret Berger, *supra* note 420 at 1350

⁴²⁷ *Ibid*

⁴²⁸ *Daubert v. Merrell Dow Pharmaceuticals*, *supra* note 416

⁴²⁹ See for example *United States v. Williams*, 583 F2d 1194, 1198-99 (2d Cir.1978) (the court examining five factors of reliability including the rate of error, how carefully a technique was applied and the existence of ‘failsafe’ characteristics.

publication’ and; d) whether it has been generally endorsed by the wider scientific community.⁴³⁰

The last criterion renders clear that, even under *Daubert*, the question of whether the particular expert opinion met the approval of the majority of the experts’ peers continued to play a role. Yet, contrary to *Frye*, under *Daubert*, the ‘general acceptance’ of a scientific view did not constitute a prerequisite for the scientific opinion’s admissibility in court as a piece of evidence.⁴³¹ The court rendered clear that the new standard it endorsed did not coincide with the quest for the scientific truth. As well, the court accepted that ‘scientific conclusions are subject to perpetual revision,’ yet ‘law on the other hand must resolve disputes finally and quickly.’⁴³² In that sense, some scholars argued that, in *Daubert*, the U.S. Supreme Court did not introduce a stricter admissibility test compared to *Frye*, but just raised the judges’ awareness to the problem of unreliable scientific evidence.⁴³³

Yet, it would also be wrong to disregard the qualitative difference *Daubert* brought to the judicial approach regarding expert evidence. Under *Frye*, expert witnesses were required to relate to the scientific opinions prevailing among the scientific community only once they based their reports on novel scientific findings. In other cases, however, where the experts’ reports were based on established scientific literature, courts were likely to accept these reports as admissible evidence without further scrutinizing their reliability.⁴³⁴

⁴³⁰ *Daubert v. Merrell Dow Pharmaceuticals*, supra note 416 at 593-594

⁴³¹ Paul Rice, EVIDENCE PRINCIPLES AND PRACTICES, Lexis Nexis Matthew Bender, 2006, 204; Pierre Patenaude, De l’Expertise Judiciaire dans le Cadre du Proces Criminel et de la Reserche de la Verite: Quelques Reflexions, 27 R.D.U.S. 1,28 (1996-97)

⁴³² *Daubert v. Merrell Pharmaceuticals*, supra note 416 at 485

⁴³³ Corine de Ruiter, The Forensic-Clinical Psychologist as Expert in Criminal Court in FORENSIC PSYCHOLOGICAL ASSESSMENT IN PRACTICE: CASE STUDIES, Corine de Ruiter & Nancy Kaser-Boyd eds., Routledge (2015) 35

⁴³⁴ Kenneth Waterway & Robert Weill, A Plea for Legislative Reform: The Adoption of Daubert to Ensure the Reliability of Exert Evidence in Florida Courts, 36 Nova L. Rev. 1,11 (2011)

Moreover, whereas under *Frye*, emphasis was put on the judge's conclusions which should coincide with those shared by the majority of the scientific world, *Daubert* did not so much stress any particular conclusion and, instead, stressed the methodology and the necessary principles undertaken to reach the conclusion.⁴³⁵ In this structure, the question of the reliability of the approach undertaken became central. The judge was appointed as a 'gatekeeper' of scientific evidence and was ultimately responsible for deciding which evidence was perceived to be scientifically reliable.⁴³⁶ In other words, the judge, not the scientific community, would decide which expert opinion should be deemed as resting on solid epistemological grounds and should, thereby, be declared admissible as evidence.⁴³⁷

In that sense, the difference between *Frye* and *Daubert* lies on the question who assesses the scientific reliability of any provided opinions. Whereas for *Frye* it is the general scientific community which comes to impose its *in abstracto*, already formulated general views on the question of the furnished opinions' credibility, for *Daubert* it is the judge who undertakes this task *in concreto*, assessing the scientific validity of the provided opinions without being bound by prior predicaments. As a result, and contrary to the possibility for judges under *Frye* to rely on generally accepted scientific precepts without requiring an ad hoc expert evaluation, the assessment process that *Daubert* entails cannot but lead to the need for expert evidence to be provided ad hoc for the particular facts in question in order for such evidence to be assessed. Conceptualizing the difference to the scenarios the thesis examines, whereas under *Frye* in order to substantiate mental harm, international criminal courts and tribunals can generally relate to established psychiatric opinions and reports stating *in abstracto* the fear and terror an

⁴³⁵ Petra van Kampen & Hans Nijboer, *Daubert in the Lowlands*, U.C. Davis L. Rev. 951,962 (1997)

⁴³⁶ *Daubert v. Merrell Dow Pharmaceuticals* supra note 416 at 597. See also Sophia Gatowski et al., supra note 404 at 436

⁴³⁷ Simon Cole, *Out of the Daubert Fire and Into the Fryeing Pan: Self Validation, Meta Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 Minn. J. L., Science & Technology 453,460 (2008)

individual experience as a result of his exposure to warfare, *Daubert* necessitates judges to assess such harm on their own. To the extent that such an assessment cannot be based on generally accepted psychological precepts but must mirror the ad hoc psychological condition of the civilian or the civilians testifying before the judge, the assessment measure of the harm inflicted to them must be provided through psychological or psychiatric opinions and reports relating specifically to them. Along these lines, under *Daubert*, the judge is led to call for the aid of mental health experts in order for them to provide him with the scientific measure he needs in order to assess the incurred mental harm.

In the years that followed its pronouncement in the *Daubert* case, the U.S. Supreme Court proceeded to expand application of the standard to also include technical issues of expertise. In the case of *General Electric Co. v. Joiner*,⁴³⁸ the plaintiff, an electrician by profession, sued General Electric Co. for the fact that he developed lung cancer as a result of the material he used during his work. The U.S. Supreme Court held that a district court judge may exclude expert testimony when there are gaps between the evidence relied on by an expert and his or her conclusion. In that sense, the court underlined that, in the core of the *Daubert* standard, there lies the presumption that conclusions and methodology should be seen as utterly interconnected with each other.⁴³⁹ Expert conclusions cannot be valid unless they rest also on a reliable methodology. While implicit in *Daubert*, the explicit broadening of the standard's applicability to all expert testimonies beyond the scientific world took place through the court's judgment in *Kumho Tire Co. v. Carmichael*.⁴⁴⁰ Patrick Carmichael was involved in a fatal road accident and sued the tire manufacturing company on the grounds that it had produced a defective product. In assessing the testimonies of engineers as expert witnesses, the U.S.

⁴³⁸ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)

⁴³⁹ *Ibid* at 146

⁴⁴⁰ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

Supreme Court also applied the Daubert standard to testimonies by non-scientists.⁴⁴¹ Justice Breyer came to note that efforts to distinguish between scientific and non-scientific evidence were ‘unlikely to produce clear legal lines capable of application in particular cases.’⁴⁴²

The gradual development of the Daubert standard in the U.S. jurisprudence through the aforementioned three Supreme Court cases made scholars see them as interrelated stages of a wider process. Hence, occasionally, reference would not be to the Daubert standard anymore, but rather to the ‘*Daubert* trilogy.’⁴⁴³ Moreover, while the standard was pronounced in the realm of a massive tort law case, the principles it came to put forth for the admissibility of expert evidence came to apply also in criminal trials. On these grounds, discussion on the standard is relevant also for this thesis.

4.3 Criticism of the Daubert Standard

Daubert introduced a revolution⁴⁴⁴ and the radical approach endorsed by it was immediately grasped by U.S. judges and scholars, some of whom having serious concerns about it. For example, right after the Supreme Court’s pronouncement, Judge Kozinski, one of the district judges to whom the case returned for further review and decision, accused his Supreme Court peers of creating a perplexing landscape in the admittance of expert evidence and obliging judges to choose one scientific opinion over another on issues that did not fall within their expertise.⁴⁴⁵ Moreover, the adoption of the Daubert standard led to fears that abandonment of the ‘general acceptance’ test, which provided certainty that the scientific views adopted by the judges and the juries did not lack scientific credibility, would augment the risk

⁴⁴¹ Deirdre Dwyer, *THE JUDICIAL ASSESSMENT OF EXPERT EVIDENCE*, Cambridge University Press (2008)191

⁴⁴² *Kumho Tire Co. v. Carmichael*, supra note 440 at 148

⁴⁴³ David Bernstein, supra note 391 at 102

⁴⁴⁴ David Faigman, *The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. Davis L. Rev. 893,929 (2013); David Bernstein, supra note 391

⁴⁴⁵ See on this the opinion of Judge Kozinski at *Daubert v. Merrell Dow Pharmaceutical*, 43 F.3d 1311 (9th Cir., 1995)

for the judges and juries to be carried away by non-credible scientific claims and for ‘junk science’ or ‘pseudoscience’ to find its way into court.⁴⁴⁶

Indeed, the U.S. Supreme Court has taken note of the fact that ‘forensic evidence is not uniquely immune from the risk of manipulation.’⁴⁴⁷ Some scholars have pointed out that, while this is true under *Daubert*, this does not mean that ‘junk science’ was absent from courtrooms under *Frye*,⁴⁴⁸ while others have emphasized how, in essence, *Daubert* offers more guarantees for keeping ‘junk science’ outside courtrooms. because judges and juries have to weigh the presented scientific evidence each time and cannot rely on its general, authoritative character.⁴⁴⁹ Indeed, empirical data demonstrates that *Daubert* has not led to an increased intrusion of ‘junk science’ in judicial decisions as feared, and neither has it loosened the threshold for expert evidence admission.⁴⁵⁰ In fact, when it comes to ‘junk science’, it seems that *Daubert* reduced, albeit not drastically, chances of its admission by courts as evidence.⁴⁵¹

At the same time, while the introduction of ‘junk science’ has not increased, some scholars have argued that, when it comes to the criminal law procedure, *Daubert* failed, mostly

⁴⁴⁶ Thomas Sabra, Addressing Wrongful Convictions: An Examination of Texas’s New Junk Science Writ and other Measures for Protecting the Innocent, 52(3) Houston L. Rev. 1037,1045 (2015); Peter Huber, Junk Science in the Courtroom, 29 Val. U. L. Rev. 723 (1992); Edward Imwinkelried, Judge versus Jury: Who should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence? 25 William & Mary L. Rev. 577,580 (1984); Richard Saver, Reimbursing New Technologies: Why are the Courts judging Experimental Medicine? 44 Stanford L. Rev. 1095,1116 (1992); Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 B.U. L. Rev. 487, 492-93 (1989); Michael Jacobs, Testing the Assumptions underlying the Debate about Scientific Evidence: A Closer Look at Juror ‘Incompetence’ and Scientific ‘Objectivity’, 25 Conn. L. Rev. 1083,1087 (1993); *State v. Carter* 524 NW2d 763,777-779 (Neb.1994). For the fact that it has been argued that arguments about ‘junk science’ reaching the court, should be seen as tied to the attempts of powerful litigants, such as multinational corporations, to discredit expert testimonies so that they should not have to face an increasing number of tort actions based on such expertise evidence see Garry Edmond & David Mercer, *Daubert* and the Exclusionary Ethos: The Convergence of Corporate and Judicial Attitudes towards the admissibility of expert evidence in tort litigation, 26 Law & Policy 231 (2004)

⁴⁴⁷ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305,318, 319 (2009)

⁴⁴⁸ Thomas Sabra, *supra* note 446 at 1041

⁴⁴⁹ David Owens, A Decade of *Daubert*, 80 Denv. U. L. Rev. 345, 345-346, 353, 356 (2002)

⁴⁵⁰ David Bernstein, The Admissibility of Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 15 Cardozo L. Rev. 2139, 2139-2140 (1994)

⁴⁵¹ Thomas Sabra, *supra* note 446 at 1045; Suzanne Riley, The End of an Era: Junk Science Departs Product Liability, 63 Def. Couns. J. 502,506-508 (1996)

due to the judges' inabilities to properly assess forensic evidence.⁴⁵² In its Report dated back in 2009, a Forensic Science Committee created by the National Academy of Sciences reached the conclusion that 'the federal appellate courts have not with any consistency or clarity imposed standards ensuring the application of scientifically valid reasoning and reliable methodology in criminal cases involving *Daubert* questions.'⁴⁵³ In that sense, the introduction of *Daubert* did not avert scenarios where, when it came to forensic sciences, judges ultimately accepted expert opinions that did not meet the criteria of scientific validity.⁴⁵⁴ However, it has been argued that the situation has changed after the publication of the 2009 Report and in many instances it is no longer the case.⁴⁵⁵

Possibly due to the judges' lack of scientific expertise,⁴⁵⁶ U.S. courts have interpreted the *Daubert* scientific validation criterion to relate to a theory's testability, rather than to its actual testing.⁴⁵⁷ Thus, these courts accepted that evidence based on polygraph examination or fingerprint identification was admissible since generally, both of these can be tested.⁴⁵⁸ Yet, it is noteworthy that even if a theory can be tested, this does not mean that it is also scientifically reliable.⁴⁵⁹ Moreover, courts have often been prone to substitute required scientific testing with 'adversarial' testing in which the testing credentials of a theory do not come from the world of

⁴⁵² Eric Lander, Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts, 86 Fordham L. Rev. 1661,1662 (2018)

⁴⁵³ National Research Council, Strengthening Forensic Science in the United States: A Path Forward 1,96 (2009)

⁴⁵⁴ Jessica Gino, An Uncivil Action: Criminalizing Daubert in Procedure and Practice to Avoid Wrongful Convictions, 119 Western Virginia L. Rev. 651,653-54 (2016)

⁴⁵⁵ Eric Lander, *supra* note 452

⁴⁵⁶ On this, see the remark of Paul Grimm, U.S. District Judge, speaking about the hurdles posed on judges in making pronouncements on scientific issues and asking rhetorically 'even if we were omniscient about the facts, what qualifies us to determine whether the principles or methodology employed by an expert, whose field we do not know, is reliable and reliably applied to the facts?' Paul Grimm, Challenges Facing Judges regarding Expert Evidence in Criminal Cases, 86 Fordham L. Rev. 1601, 1602 (2018)

⁴⁵⁷ David Kaye, How Daubert and its Progeny have Failed Criminalistics Evidence and a few Things the Judiciary could do about it, 86 Fordham L. Rev. 1639,1643 (2018)

⁴⁵⁸ *Ibid*

⁴⁵⁹ *Ibid*

science, but rather from the fact that it has been tested in the adversarial system for over a century.⁴⁶⁰

This elusiveness of the testing ground may become more acute due to the fact that the standard remains ambiguous, or ‘flexible’ as termed by the Committee,⁴⁶¹ and does not provide a firm method for the assessment of expert evidence.⁴⁶² As noted,⁴⁶³ *Daubert* provides a framework, but not a blueprint, that guides judges in their evaluation of expert evidence. Although the U.S. Supreme Court indicated which elements judges have to take into account in coming to assess an expert opinion’s reliability, it did not provide further details on how these elements themselves were to be assessed. For example, while the Court spoke of ‘peer review publications’, it did not provide any indications of the number of such reviews needed nor of their quality.⁴⁶⁴ Similarly, the Court did not give any examples to explain how it perceived the ‘falsification’ of a scientific theory.⁴⁶⁵ The same is true also regarding the question of how judges can trace the error rates of scientific findings.⁴⁶⁶

Expert bias also casts doubt on the feasibility of the *Daubert* standard as a suitable tool for the admissibility of expert evidence. Modern society has come to rely extensively on experts.⁴⁶⁷ The moment courts have declared that expertise that fell short of the accepted dogma in a particular field of science is ‘reliable’, *Daubert* critics have raised the fear that litigants

⁴⁶⁰ Ibid at 1644

⁴⁶¹ National Research Council, Strengthening Forensic Science in the United States: A Path Forward 1,96 (2009)

⁴⁶² Randolph Jonakait, The Meaning of Daubert and What that Means for Forensic Science, Cardozo L. Rev. 2103,2104 (1994); Joseph Sanders, Scientific Validity, Admissibility and Mass Torts after Daubert, 78 Minn. L. Rev. 1387,1391 (1994); Paul Milich, Controversial Science in the Courtroom: Daubert and the Law’s Hubris, 43 Emory L. J. 913,926 (1994). Any ambiguity concerns the Daubert standard may present become graver by the fact that expert testimonies and reports are often considered to be marred by indecision and exaggerations in the final conclusions. On this, see D. Shuman, E. Whitaker & A. Champagne, An Empirical Examination of the Use of Expert Witnesses in the Court-Part III: A Three City Study, 34 Jurimetrics J. 193 (1994) (referring to a relevant study among U.S. lawyers, finding 40% of them citing these concerns about expert testimonies)

⁴⁶³ Margaret Berger supra note 420 at 1345

⁴⁶⁴ For the fact that this ambiguity has led to a lax practice by courts see David Kaye, supra note 457 at 1645

⁴⁶⁵ Sophia Gatowski et al., supra note 404 at 437

⁴⁶⁶ Ibid

⁴⁶⁷ Deirdre Dwyer, supra note 441 at 2

manipulate the system deluging courts with expert opinions and that defence and prosecution lawyers in criminal trials use experts to promote their own partisan arguments under a mantle of scientific expertise.⁴⁶⁸ In that sense, the expert witness ceases to be an independent factor in trial meant to help the court in its judgment and is, instead, transformed into a pawn of the parties in order to serve their parochial interests. When judges and juries do not have opinions of their own on a particular matter of expertise beforehand, they are seen as caught in the middle of what has been termed as ‘a battle of experts’ which ‘degenerates into a simple beauty contest’,⁴⁶⁹ due to the fact that they cannot choose between the conflicting expert evidence that they have heard. These fears of compromise in the experts’ impartiality and the negative repercussions this can have on judges’ abilities to utter their stance on an issue is further mirrored in a relevant survey that took place among judges in the United States. This survey found that one of the most frequent problems that judges encountered with expert witnesses was their tendency to abandon objectivity and become advocates for one of the two sides in a trial.⁴⁷⁰ Quite interestingly, in an attempt to address this bias, scholars have called on judges themselves to take the initiative and invite expert witnesses to testify in the hope that this will lead to testimonies by ‘neutral witnesses’.⁴⁷¹

At the same time, it is important to note that such grasp of expert bias is not necessarily perceived by judges outside the U.S. For example, Ian Freckelton and his peers conducted surveys on behalf of the Australian Institute of Judicial Administration which brought up, *inter alia*, the issue of the possible problems expert testimonies raised for judges. In a 2001 survey

⁴⁶⁸ Deirdre Dwyer, *ibid* at 3; Pierre Patenaude, *De l’Expertise Judiciaire dans le Cadre du Proces Criminel et de la Reserche de la Verite: Quelques Reflexions*, 27 R.D.U.S. 1,12 (1996-97) (with further references on the relevant bibliography)

⁴⁶⁹ John R. Spencer, *Court Experts and Expert Witnesses: Have we a Lesson to Learn from the French?* 45 *Current Legal Problems* 211,224 (1992)

⁴⁷⁰ S. Dobbin et al., *Applying Daubert: How Well do Judges understand Science and Scientific Method?* 85 *Judicature* 244-247 (2002)

⁴⁷¹ Samuel Gross, *Expert Evidence*, 1991 *Wis. L. Rev.* 1113,1188-89 (1991)

that was conducted on a sample of 203 magistrates, 29.6% rated expert bias as the most serious problem expert evidence raised.⁴⁷² In comparison, in a 2016 survey that was conducted on a sample of thirty-six Australian judges of which 72.1% were primarily involved in criminal cases, expert bias was only seen as a problem in four out of the fifty-five cases that were included in the study.⁴⁷³ Nevertheless, some judges expressed their surprise regarding this lack of expert bias, suggesting as noted, that expert bias is still a consideration which exists among judges,⁴⁷⁴ albeit maybe in a more subconscious manner.

The voices of criticism towards *Daubert* have not prevented judges and scholars from viewing the standard as a form of progress in the assessment of expert evidence.⁴⁷⁵ Even scholars who have pointed out the standard's shortcomings and difficulties with its implementation in criminal law procedure have not called for abandoning the standard altogether. Rather, they propose ways for its improvement and for better implementation by the courts.⁴⁷⁶ In a national survey conducted among 400 U.S. state trial court judges, more than 50% concluded that the *Daubert* standard had either 'a great deal of value' or 'some value' compared to only 6% who stated that the standard had no value at all.⁴⁷⁷

⁴⁷² Ian Freckelton et al., *Australian Magistrates Perspectives on Expert Evidence: A Comparative Study*, 2001 cited in Kristy Martire & Agnes Bali, *Judicial Attitudes towards Expert Evidence*, Report prepared for Unisearch Expert Opinion Services, April 28, 2016, 19 available at <https://www.unisearch.com.au/documents/JO88102-Literature-Review-Judicial-Attitudes-toward-Expert-Evidence.pdf>

⁴⁷³ Ian Freckelton et al., *EXPERT EVIDENCE AND CRIMINAL JURY TRIALS*, Oxford University Press (2016) 5; Kristy Martire & Agnes Bali, *ibid* at 22

⁴⁷⁴ Kristy Martire & Agnes Bali, *ibid*

⁴⁷⁵ Bert Black, *The Supreme Court's View of Science: Has Daubert Exorcised the Certainty Demon?* 15 *Cardozo L. Rev.* 2129, 2137 (1994); Kenneth Chesebro, *Taking Daubert's Focus Seriously: The Methodology/Conclusion Distinction*, 15 *Cardozo L. Rev.* 1745, 1753 (1994); Robert Simon, *Some Answers to the Daubert puzzle*, 9 *St. John's J. Legal Comment.* 37,39 (1993); Richard Goldberg, *Using Scientific Evidence to Resolve Causation Problems in Product Liability in PERSPECTIVES ON CAUSATION*, (Richard Goldberg ed., Hart Publishing, 2011) 178

⁴⁷⁶ David Kaye, *supra* note 457; Karen Kafadar, *The Critical Role of Statistics in Demonstrating the Reliability of Expert Evidence*, 86 *Fordham L. Rev.* 1617, 1619 (2018); Eric Lander, *supra* note 452 at 1676-77

⁴⁷⁷ Sophia Gatowski et al., *supra* note 404 at 436, 443

4.4 Acceptance of the Daubert Standard in U.S. State and Federal Practice and Jurisprudence

The objections against the Daubert standard were not enough to hinder its further entrenchment in U.S. federal and state law and jurisprudence. Ultimately, the Daubert standard was incorporated in the U.S. federal rules of criminal procedure. Under the caption ‘Testimony by Expert Witnesses’, Rule 702 stipulates, in its current form, that a court will consider an expert opinion as admissible if

- a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and

the expert has reliably applied the principles and methods to the facts of the case.⁴⁷⁸

Currently, the Daubert standard is endorsed by most U.S. states.⁴⁷⁹ Along these lines, it can be argued that the tendency is for U.S. states to move from *Frye* to *Daubert*,⁴⁸⁰ albeit not without debates and occasionally also some stepping back. For example, in 2014, Florida conducted a number of deliberations on whether or not to endorse the Daubert standard over

⁴⁷⁸ On this see Federal Rules of Evidence, Rule 702 available at

<http://www.forensicsciencesimplified.org/legal/702.html>

⁴⁷⁹ Martin Kaufman, The Status of Daubert in State Courts, Atlantic Legal Foundation available at

<http://www.iapsych.com/iqmr/daubertstates.pdf>

⁴⁸⁰ On this the most recent example comes from the New Jersey Supreme Court which in August 2018, albeit not explicitly referring to *Daubert* yet echoing it, held that trial courts must assess the validity of a scientific opinion through recourse to factors such as the epistemological validity of the provided opinion, including, inter alia, the questions whether it has been tested and has been subject to peer review or to publication. On this, see Paul Halasz et al, New Jersey Supreme Court moves closer to the Daubert standard for admissibility of Expert Testimony, Day Pitney Alert, 3 August 2018 available at

https://www.daypitney.com/insights/publications/2018/08/03-nj-supreme-court-moves-closer-daubert-standard?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

the Frye one. Ultimately, the Florida legislature decided to adopt the Daubert standard,⁴⁸¹ but in 2017, the Florida Supreme Court declined to approve it.⁴⁸² Drawing on the fact that according to Florida's constitution, it is the Court and not the legislature which must decide on new rules of court procedure unless these rules are substantive, the Court cited 'grave constitutional concerns' and left open the question of whether adoption of the Daubert standard should be seen as a procedural or substantive issue.⁴⁸³

The augmenting preference of U.S. state courts for Daubert over Frye must be attributed to the dynamic the Daubert standard exhibits when it comes to the assessment of expert evidence. As correctly noted,⁴⁸⁴ Daubert does not circumvent the problems associated with how such an assessment is to take place, but rather takes the relevant burden from the jury's shoulders and places it on those of the judge. Still, the underlining of the reliability parameter, not necessarily as something mirroring a general scientific consensus but as portraying the epistemological validity even of an individual opinion, renders a new dynamic and flexibility for the judge to also adopt novel theories.

4.5 Conclusion

The current chapter discussed the origins and essence of the Daubert standard. Placing these origins in the wider adversarial system that governs criminal proceedings in the U.S., the chapter delineated how *Daubert* came to address the need for judges to not just rely on expert

⁴⁸¹ Stephen Smith, Fourth District Court of Appeal Confirms Florida's Adoption of the Daubert standard for Expert Witness Testimony in Florida State Court Applies Retroactively, August 1, 2016 available at <http://www.jdsupra.com/legalnews/4th-dca-confirms-floridas-adoption-of-t-52057/>

⁴⁸² Supreme Court of Florida, In Re: Amendments to the Florida Evidence Code, No.SC16-181, February 16, 2017

⁴⁸³ Ibid at 8

⁴⁸⁴ Deirdre Dwyer, supra note 441 at 2

evidence furnished by a competent person and required that they also embed reliable scientific conclusions. On this account, *Daubert* aspired to address the problem of ‘junk science’ in U.S. jurisprudence and the possibility that parties would resort to experts who would just pen a favourable scientific report which would serve the commissioning party’s interest. Despite some criticism addressed to it, largely due to the inability of the judges to review the validity of scientific conclusions, *Daubert* is by now the expert evidence assessment standard in most U.S. states. The question is, however, whether *Daubert* can be seen as applying beyond the confines of U.S. jurisdiction so that it can be deemed to hold a comparative value as a general principle of law. This is a question that the next two chapters will try to address. Chapter 5 will examine the application of the Daubert standard in other common law jurisdictions, whereas Chapter 6 will examine the application of this standard beyond the common law world.

Chapter 5: *The Daubert Standard in the Common Law Jurisdictions*

5.1 Introduction

The fact that the U.S. legal order comes under the wider caption of common law, similar to that in a number of other jurisdictions, makes the assumption plausible that the latter's courts would most likely relate to expert evidence in a *Daubert*-like way too. Yet, an automatic transposition of *Daubert* in other common law traditions is far from evident.⁴⁸⁵ Despite the common law heritage they share, each state and jurisdiction is unique and holds its own specific features, to the extent that it would be utopic to argue that other states would automatically adopt in toto the U.S. procedural arrangement. This becomes more acute due to the fact that the U.S. does not belong to the British Commonwealth, whereas most other states that belong to the common law family do. In that sense, it is law precepts as developed by courts in England that serve as the natural guidance for judges in these common law countries. Thus, the *Daubert* standard, which is not a standard elaborated in the English jurisprudence, would not be seen automatically as susceptible to transposition.⁴⁸⁶ Along these lines, the critical question becomes not whether other foreign jurisdictions adopt the *Daubert* standard *in globo*, but rather whether or not they abide by its precept that judges must ensure that matters of expertise are discussed using opinions and reports which themselves are based on scientifically reliable grounds.

⁴⁸⁵ On these lines, see also Suryapratim Roy, Mediators and Moderators of Normative Reductionism: Towards a Testimonial Approach to Expertise in Legal Inquiry, 7(3) Eur. J. Risk Regulation 532, 544 (2016)

⁴⁸⁶ The fact that the transposition of the *Daubert* standard in other common law jurisdictions should be deemed as far from being evident, is highlighted by the fact that in contrast to the U.S., the use of jury—one of the main reasons triggering endorsement of the standard, is much less frequent in England. On this, see Andrew Jurs, Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of post-*Daubert* U.S. Reliability Determinations, 95 Marquette L. Rev. 1329, 1374 (2012)

In order to address this question, the current chapter will focus on a number of common law jurisdictions. The discussion will start with the arrangements in England and Wales, given that the English law is the cradle of common law and will continue to see how English law has influenced other major Commonwealth countries around the globe. The examples of Canada, Australia, New Zealand, Canada, India, South Africa and Cyprus will be discussed. Turning the focus to a possible English influence on non- Commonwealth countries which were once part of the British Empire, the thesis will discuss Ireland and Israel.⁴⁸⁷ On this account, it is particularly in these countries that the question of whether or not the Daubert standard reliability parameter should apply in criminal proceedings must be seen-if true-as a conscious option rather as an automatic endorsement of any established, common law approach.

5.2 England and Wales

English courts are the ones that formed the traditional common law stance according to which admission of expert evidence was to be based on the following criteria:⁴⁸⁸

1. The witness should be an expert in his field.
2. The subject of the expertise should relate to a judicially recognized body of knowledge or experience that fell beyond the reach of the ordinary juror.
3. There should be a need for such an opinion to be provided.

⁴⁸⁷ Patrick Fitzgerald, *The Status of British Law in Independent Ireland: A Guide for Post-Brexit Britain?* 20 *Irish J. European L.* 24,29 (2017); Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 *Isr. L. Rev.* 324, 326-327 (1975); Tim Koopmans, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* (Cambridge University Press,2003) 42; Eliezer Rivlin, *Israel as a Mixed Jurisdiction*, 57 *McGill L. J.* 781 (2012)

⁴⁸⁸ For these criteria and their elaboration, see Oliver Holdenson, *The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification*, 16 *Melb. U. L. Rev.* 521,529-537 (1988)

4. The expert witness was not permitted to utter his personal opinion about the facts of the case.
5. The opinion should be based on proven facts.

In the *Ikarian Reefer* case, Cresswell J further elaborated on the above parameters by referring to the ‘independent assistance’ that the expert must provide to the court, namely that such an expert should mention the facts and assumptions upon which the conclusions are based; that the provided opinion must be well-researched and; that the expert informing the court likewise if this is not the case.⁴⁸⁹ In that sense, what becomes cardinal is that expert opinions are not just provided by competent authorities and, instead, are also grounded on a firm methodology. It is true that historically in the evolution of common law jurisprudence, the requirement that the opinion came from a person with specialized knowledge in a field predated the necessary elements that such an opinion should also endorse. At the same time, in early jurisprudence, this did not mean necessarily that this expert should be also formally qualified. Thus, for example in *R v. Silverlock*, an amateur graphologist was allowed to testify as an expert on handwriting.⁴⁹⁰ The element stressed was that the expert needed to possess experience, but not necessarily qualifications beyond those of a layman.⁴⁹¹ As no certain qualifications were needed to escort the expert’s credentials, so too, there was no need for the provision of reliable scientific standards for the experts’ conclusions. In *R v. Robb*,⁴⁹² a phonetician had identified the appellant’s voice using a technique that could not be deemed scientifically reliable. This, nevertheless, did not deter Lord Bingham from declaring the particular phonetician’s assessment as

⁴⁸⁹ *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd’s Rep.68 at 81-82

⁴⁹⁰ *R. v. Silverlock* [1894] 2 QB 766; Ian Freckelton, *The Anthropologist on Trial*, 15 Melb. U. L. Rev.360,365(1985)

⁴⁹¹ *Liddle v. Middleton* [1894] 2 QB 766

⁴⁹² *R v. Robb* [1991] 93 Cr App R 161

admissible on the grounds that what should be examined by the judge was whether study and experience gave the expert more knowledge than a layman and whether the witness was skilled enough to possess the relevant knowledge.

This lack of any consideration for the scientific reliability of the chosen method was gradually addressed by English courts. Thus, in the case of *Kennedy v. Cordia*, the UK Supreme Court explicitly came to include the reliability of the provided evidence as one of the parameters that had to be taken into account by the court concerning the question of this evidence's admissibility.⁴⁹³ At the same time, it is important to note that when it comes to the question of how such reliability is to be measured, English jurisprudence has not followed a unified stance. While English courts have generally seemed to officially side with *Frye*, certain judgments have left open the prospects of a Daubert standard endorsement.

In *R v. Gilfoyle*,⁴⁹⁴ a case concerning the question of whether a man had murdered his wife or she had committed suicide, in coming to assess the relevant opinion provided by Professor Canter, a distinguished psychologist, the Court of Appeal rendered clear that the expert's scientific credentials were not enough on their own to declare a provided opinion as an admissible piece of evidence. This is because it is opinion itself that needs scientific reliability for this to take place. In the Court's words

'...although Professor Canter is clearly an expert in his field....his reports identify no criteria by reference to which the court could test the quality of his opinions: there is no data base

⁴⁹³ UK Supreme Court, *Kennedy (Appellant) v. Cordia (Services) LLP* (Respondent) (Scotland) [2016] UKSC 6, Judgment (10 February 2016), para.44. For the fact that this is the case also in Scotland which has a different criminal jurisdiction from England and Wales see *Young (Thomas Ross) v HM Advocate* [2013] HCJAC 145 (the Scottish High Court noting that expert evidence must be based 'on a recognized and developed scientific discipline')

⁴⁹⁴ *R v. Gilfoyle* [2001] 2 Cr App R 5

comparing real and questionable suicides and there is no substantial body of academic writing approving his methodology.⁴⁹⁵

At the same time, in *Gilfoyle*, the Court proceeded to clarify that, as far as the reliability requirement is concerned, its approach matches the Frye approach taken by U.S. courts. Citing the Frye standard approach as the authoritative approach endorsed by English jurisprudence as well, the Court concluded that ‘evidence based on a developing new brand of science or medicine is not admissible until accepted by the scientific community as being able to provide accurate and reliable opinion.’⁴⁹⁶

Gilfoyle came to dispel any scientific methods which albeit can be reliable, but have nevertheless, not been accepted by the majority of the scientific community. Although reference to the Daubert standard is never explicitly made, it seems, as conceded by Lord Justice Kennedy in *Dallagher*⁴⁹⁷ that by proclaiming the validity of *Frye*, the Court in *Gilfoyle* indirectly made the juxtaposition with the Daubert standard and rejected the latter. *Dallagher* is important to the extent that in the particular judgment, Lord Justice Kennedy referred to the *Gilfoyle* case and the Daubert or the Frye dilemma posed there in order to conclude that the balance scales should be tilted in favour of the Daubert standard. Declaring that under English law the question of whether an expert opinion should be admissible or not should be judged according to whether or not the particular opinion is ‘sufficiently well-established to pass the ordinary tests of relevance and reliability,’⁴⁹⁸ Lord Justice Kennedy hailed to proclaim that

⁴⁹⁵ Ibid, para.25

⁴⁹⁶ Ibid

⁴⁹⁷ *R v. Dallagher* [2003] 1 CR App R. 12 at 195,207, para.29

⁴⁹⁸ *R v. Dallagher*, ibid at 195

‘As to the English approach we have found it necessary to refer...to a number of decisions, especially *Clarke*, from which as it seems to us, the analogy with rule 702 [sic of the U.S. Rules of Criminal Procedure] is clear.’⁴⁹⁹

Other cases decided by English courts also render the impression that when it comes to the question of the expert opinion’s reliability, English jurisprudence is amenable to an approach which endorses the Daubert standard and the admissibility of scientific opinions even if these are not shared by most scientists. For example, in the case of *R v. Clarke*, the Court had to decide whether the video superimposition methodology used to compare the defendant’s photograph with others taken at a robbery scene could lead it to be considered as admissible evidence.⁵⁰⁰ The Court noted that courts ‘should take into account modern methods of crime detection’ and that ‘it would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and new advances in science.’⁵⁰¹ It went on to state that, in coming to assess expert evidence, emphasis should be placed on the reliability of the scientific technique.⁵⁰² In that sense, by linking the scientific reliability requirement with the existence of new scientific methods and techniques, the Court seemed to favourably view the prospects of accepting the Daubert standard as a suitable expert evidence admissibility threshold, without the Court itself ever explicitly stating so.

It is true that, by citing reliability concerns, English courts have come to echo elements of the Daubert standard. The same is also true with their pronouncement that when it comes to the admissibility of expert evidence, judges are open to ‘new techniques and new advances in science.’⁵⁰³ At the same time, such a stance does not fully endorse the Daubert standard.

⁴⁹⁹ Ibid, para.29

⁵⁰⁰ *R v. Clarke* [1995] 2 Cr App R 425

⁵⁰¹ Ibid at 429

⁵⁰² Ibid at 431

⁵⁰³ On these grounds, see also *R. v. Luttrell* [2004] EWCA Crim 1344 (May 28, 2004), para.37

Although it applies the reliability parameters to the question of whether the witness has the necessary expertise, it does not equally demand such reliability parameters to be in place regarding how the selected methodology is applied to the facts of a case. This is palpably demonstrated in *R v Reed*, a case concerning the admissibility of DNA evidence, where the Court of Appeal held that ‘expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable.’⁵⁰⁴ Yet, the Court failed to provide any indications on how such reliability is to be measured and consequently did not proceed to engage with any questioning of the undertaken methodology.

Similarly, in the case of *Harris* involving the defendant’s request for review of her manslaughter conviction due to new medical evidence, the Court of Appeal, summarizing the established position in jurisprudence, held that it was necessary for expert witnesses to provide independent assistance to the Court by clarifying whether the requested opinion fell within their expertise and by stating the facts or assumptions upon which their opinions were based.⁵⁰⁵ Yet, the Court did not extend such obligations to cover the methodology undertaken.

Along the same lines, emphasis on reliability covering the witness’s expertise more than the way this expertise was to be applied to the contested facts can be seen in the stance the Court of Appeal took in *Luttrell*.⁵⁰⁶ In that case, coming to admit expert evidence based on lip-reading of a videoed conversation, the Court explicitly rejected the appellants’ argument that pieces of evidence should be seen as reliable only once they were subjected to cross-examination. The Court stated, as well, that, in their opinion, the proper view on the issue should be ‘that so long as a field is sufficiently well-established to pass the ordinary test of relevance and reliability,

⁵⁰⁴ *R v Reed, Reed & Garmson* [2009] EWCA Crim 2698 (21 December 2009), para.111. See also *R v Dlugosz* [2013] EWCA Crim 2 (30 January 2013), para. 11

⁵⁰⁵ *R v. Harris* [2005] EWCA Crim 1980 (21 July 2005), para.271

⁵⁰⁶ *R. v. Luttrell*, supra note 503

then no enhanced test of admissibility should be applied.⁵⁰⁷ Nevertheless, the Court did not further examine whether this reliable, epistemological method was also reliably applied to the facts of the case. On these grounds, the assumption seems to be that, since an opinion is provided by an expert and is based on a scientifically reliable field, it will also automatically apply to the facts of the case in a reliable way.

Despite the plausibility that such an assumption holds, it does not cease to rest on a hypothesis. By the same token, there have been judgments by English courts that have sought to rectify the aforementioned stance as far as reliability is concerned and broaden its scope in order to also embrace methodological issues. This is true in English courts cases concerning the ‘shaken baby syndrome’ where defendants have been accused of manslaughter for the death of babies caused by violent shaking and hitting. For example, in *Bowman*, a case dealing with the autopsy on a deceased baby so that the Court could establish the possible guilt of the defendant for the baby’s death, the Court of Appeal explicitly held that the experts’ reports should include, among others, elements such as ‘the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based’, ‘information relating to who has carried out measurements, examinations, tests.... and the methodology used, and whether or not such measurements.... were carried out under the expert's supervision’ and ‘the reasons for the opinion given.’⁵⁰⁸ Similarly, in the joint case of *Henderson, Butler and Oyediran*, the Court of Appeal referred to the fact that before coming to admit an expert opinion, the trial judge must examine, inter alia, to what extent the expert’s view is widely held.⁵⁰⁹ This emphasis on the reliability parameter is also seen in other cases outside the ‘shaken babies syndrome’

⁵⁰⁷ Ibid, paras.34, 37

⁵⁰⁸ *R v. Bowman* [2006] EWCA Crim 417 (March 2, 2006), para. 177

⁵⁰⁹ *R v. Henderson; R v. Butler; R v. Oyediran* [2010] EWCA Crim 1269 (June 17, 2010), para. 207. See also *R v. Weller* [2010] EWCA Crim 1085, para. 48

framework.⁵¹⁰ For example, in *Ahmed & Anor v. R.*,⁵¹¹ the Court of Appeal examined the question of whether the testimony of Professor Clarke, an expert on international relations, was based on reliable data.⁵¹² On these grounds, the Court of Appeal examined both Professor Clarke's academic credibility as well as the credibility of his scientifically reached historic conclusions. Thus, the Court of Appeal agreed with the court of first instance that Professor Clarke was 'a well-respected member of his academic discipline' and that the method used to extract certain historic conclusions was reliable and properly academic.⁵¹³ At the same time, the Court of Appeal also attached an importance to the methodological reliability of the reached conclusions. This is portrayed through the fact that the Court explicitly quoted the trial judge's explicit reference to the methods of triangulation, context, and validation used by Professor Clarke to extract his conclusions.⁵¹⁴

In the case of *R v. T*,⁵¹⁵ T was convicted for murder partly due to a comparative analysis of shoeprints. Coming to accept T's appeal, the Court of Appeal examined not only whether shoeprints could be a reliable field of expertise to serve as admissible evidence, but also whether the expert witness had applied the knowledge that such a field could provide in a reliable way. Coming to answer in the negative, the Court criticized the expert witness for presenting his opinion in a way that did not permit judges and juries to see how the expert had reached his conclusions.⁵¹⁶ Moreover, the Court held that while, in general, probabilistic calculations were accepted in relation to DNA-profiling evidence, in this particular case such calculations were not applied in a reliable manner in order to be deemed precise and thus

⁵¹⁰ See for example *R v. Reed* [2009] EWCA Crim 2698 (the Court of Appeal indicating that the reliability parameter is part of law); *R v. Broughton* [2010] EWCA Crim 549, para. 32 (the Court of Appeal holding that reliability considerations are part of the law which the court must consider)

⁵¹¹ *Ahmed & Anor v. R.* [2011] EWCA Crim.184 (Feb. 25, 2011)

⁵¹² *Ibid*, para.57

⁵¹³ *Ibid*, paras.64-65

⁵¹⁴ *Ibid*, para.63

⁵¹⁵ *R v. T* [2010] EWCA Crim 2439. On the particular case see also Mike Redmayne et al., *Forensic Science Evidence in Question*, 5 Crim L. Rev. 347 (2011)

⁵¹⁶ *R v. T*, *ibid* at 108

admissible.⁵¹⁷ In that sense, regarding their application in the specific exigencies that the particular case presented, the Court did not only look at the reliability of these calculations *in abstracto* as a general method, but also *in concreto* and concluded that, outside the field of DNA, such probabilistic calculations should not be used.⁵¹⁸

On account of the aforementioned cases and the stance taken by English courts, senior legal officials have similarly stressed how important it is for the reliability parameter to also come and cover the question of an expert field's application to the facts of a case. For example, echoing the Court's pronouncement in *Bowman*, a guidance booklet for expert witnesses published by the Crown Prosecutions Service ordains the former to include in their report provided to courts the following details, inter alia: any information upon which they have relied to reach their opinion; how such opinions are scientifically justified; who conducted the relevant experiments and; any verifying examinations of the conclusions reached.⁵¹⁹

The emphasis jurisprudence placed on the fact that judges should form their stance based on reliable opinions, incurring upon expert witnesses the task of providing further justifications for reaching a certain epistemological conclusion, was ultimately transmitted in the arrangements embedded in the UK legislation. Already from the first decade of this century, academics and the UK Parliament expressed a stance in favour of the adoption of the Daubert standard.⁵²⁰ In coming to propose the parallel creation of a Forensic Advisory Council,⁵²¹ the House of Commons' Science and Technology Select Committee came to the conclusion that

⁵¹⁷ Ibid at 86

⁵¹⁸ Ibid at 90

⁵¹⁹ Crown Prosecution Service, Guidance Booklet for Experts, Disclosure: Experts' Evidence, Case Management and Unused Material, May 2010, p.14

⁵²⁰ UK Parliament, House of Commons Select Committee on Science and Technology Seventh Report, March 16, 2005, paras.172-173 (referring to the stance of Dr Chris Pamplin that it is time for English courts to adopt the Daubert standard and that of Professor Sir Alec Jeffreys who described the U.S. *Frye* and *Daubert* hearings as 'an interesting development') available at

<https://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/96/9610.htm>

⁵²¹ Ibid, paras.11,173,182

‘The absence of an agreed protocol for the validation of scientific techniques prior to their being admitted in court is entirely unsatisfactory....We recommend that one of the first tasks of the Forensic Science Advisory Council be to develop a ‘gate-keeping’ test for expert evidence. This should be done in partnership with judges, scientists, and other key players in the criminal justice system and should build on the U.S. Daubert test.’⁵²²

Quite importantly, the proposal for the establishment of a Forensic Advisory Council came at a time when the Council for the Registration of Forensic Practitioners was already in place. By endorsing a list of experts meant to provide expert testimony before courts and echoing inquisitorial influence, a continental law, the Council aimed to ensure that the testifying experts would enjoy certain credentials. Nevertheless, the establishment of the Council for the Registration of Forensic Practitioners addressed only the reliability of the experts themselves. Proposals, such as the one regarding the Forensic Advisory Council, demonstrated how important it was for the reliability of the provided opinion to be equally addressed.⁵²³ Thus, it may not be accidental that, in 2009, the Council for the Registration of Forensic Practitioners ceased to exist.⁵²⁴ Proposals for reforms in expert testimonies suggested by the Science and Technology Select Committee were shared by the Law Commission. In its 2011 report⁵²⁵ the Law Commission expressed its discomfort with the fact that, *inter alia*, expert evidence was admitted too quickly without allowing the judges adequate time to filter the reliability of the provided evidence.⁵²⁶

⁵²² Ibid, para.173

⁵²³ On these grounds see the utterance of Lord Justice Thomas in *Reeds* that ‘with the establishment of the Forensic Science Advisory Council and the Forensic Science Regulator, there may be very much more assistance available to the court, as there was in this case on appeal for us, to help it in its assessment of whether the evidence is sufficiently reliable for it to be admitted...’ (*R v Reed*, *supra* note 504, para.111)

⁵²⁴ Lord Thomas CJ, *The Legal Framework for more robust Forensic Science Evidence*, *Phil. Trans. R. Soc. B* 370, 24 April 2015, p.3 available at <http://rstb.royalsocietypublishing.org/content/royptb/370/1674/20140258.full.pdf>

⁵²⁵ Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Law Com. No.325 (21 March 2011)

⁵²⁶ Ibid at 181

The UK Criminal Procedure Rules must also be seen in a similar, pro-Daubert vein. Although the Rules do not include any guidelines on how the judge must assess expert evidence, they do include instructions for expert witnesses on what elements their reports must encompass. They thus stipulate that expert witnesses must say who carried out the examinations or tests upon which their opinion is based or give the scientific credentials of the people they relied upon for their opinion⁵²⁷ as well as the reasons behind the opinion's conclusions.⁵²⁸ Expert witnesses must include 'such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence.'⁵²⁹

By ordaining expert reports to be reliable and contain these *Daubert*-like elements, the Rules put under judicial scrutiny whether this is in fact the case. Thus, although the reliability parameter and the *Daubert*-like elements in the Rules, for example the conducting of tests and investigations, are directly addressed to expert witnesses, indirectly they also affect judges. This is because in coming to decide on the admissibility of such expert evidence, judges must also examine whether this reliability parameter has been considered. This is expressly acknowledged by the Criminal Practice Directions which endorse the Rules' elements contained in Rule 19.4 as the 'factors which the court may take into account in determining the reliability of expert opinion'.⁵³⁰

⁵²⁷ Criminal Procedure (Amendment) Rules 2018, 2018 No.132 (L.2), April 2018 available at <http://www.legislation.gov.uk/ukxi/2018/132/made>

⁵²⁸ Criminal Procedure Rules, Section 19.4 (e) and (f), October 2015 available at <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf>

⁵²⁹ Ibid at Section 19.4 (h)

⁵³⁰ Criminal Practice Directions [2015] EWCA Crim 1567 (29 September 2015) at 63

5.3 Beyond the Oceans: The Assessment of Expert Evidence and the Impact of English law on other Commonwealth nations

Whereas the Commonwealth nations extend over all the globe, resting in many cases thousands of miles away from England, it is interesting to see that in most cases, the physical distance and the non-geographical vicinity are not so strong in order to create a rupture between these nations and England. Accordingly, their legal arrangements, also when it comes to the issue that this thesis focus upon, namely the expert evidence assessment, follows, at least as a starting point, the English law arrangements. This is the case for example with Australia whose courts have tended to traditionally view the question of expert evidence assessment the same way their English peers did. Already from the '80s, the Australian Law Reform Commission had declared that an expert witness is seen as someone who, through the specialized knowledge he or she possesses on a subject, is meant to elucidate the court on a certain issue.⁵³¹

In Federal Law, Section 79 of the *Evidence Act* aspires to introduce a uniform law of evidence to all state jurisdictions in Australia and is the relevant provision that governs expert testimonies in courts.⁵³² Subsection 1 of Section 79 stipulates that if a person has specialized knowledge based on his or her training, study or experience, he or she can supply an expert opinion but it must be based wholly or substantially on this expertise knowledge.⁵³³ The

⁵³¹ Ian Freckelton, *The Anthropologist on Trial*, 15 Melb. U. L. Rev. 360, 364, 366 (1985). For the fact that English and Australian law bear similarities regarding the law of expert evidence see Guido Acquaviva et al., *Testimony of Expert Witnesses, Journalists, ICRC and UN Staff in INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES* (Goran Sluiter et al. eds., Oxford University Press, 2013) 926

⁵³² As of 2014, Queensland and Western Australia had not incorporated the Evidence Act in their domestic state jurisdictions. On this see Gary Edmond & Mehera San Roque, *Before the High Court-Honeysett v. The Queen: Forensic Science, 'Specialized Knowledge' and the Uniform Evidence Law*, 36 Sydney L. Rev. 323 (2014). For the fact that according to section 79 of the Evidence Act Australian state courts can apply state and not federal law when it comes to the law of evidence see Australian Law Reform Commission, *Uniform Evidence Law Report* 102, December 2005 at 40

⁵³³ Evidence Act [1995], section 79

reference to ‘specialized knowledge’ has been perceived as echoing the U.S. Federal Rules of Evidence.⁵³⁴

Nevertheless, with regards to expert opinions, Australian federal legislation places the emphasis on the academic or scientific credentials of the opinion’s provider, but nothing is said in the law itself on whether such an opinion must be reliable or according to which standards the judge is meant to examine such reliability.⁵³⁵ The question of reliability is completely linked to the question of whether or not the provided opinion, in fact, falls within the expert witness’s field of expertise,⁵³⁶ and scholars have lamented the lack of clear standards on the fields that can give rise to admissible expert testimonies.⁵³⁷ Based on the law’s reference to ‘specialized knowledge’, these scholars have argued that such reference should be read as to include scientific fields.⁵³⁸ This should be viewed in tandem with the assertion of the High Court of Australia that the ‘specialized knowledge’ reference in the provision draws directly from the *Daubert* judgment.⁵³⁹

One should note that although the reliability parameter was not expressly included in Section 79 of the *Evidence Act*, this does not mean that a reliability requirement has not been viewed by Australian courts as an essential element for the admissibility of an expert opinion.

⁵³⁴ Ian Freckelton, Judicial Attitudes Towards Scientific Evidence: The Antipodean Experience, 30 University of California Davis L. Rev. 1137,1176 (1997)

⁵³⁵ Erica Beecher-Monas, EVALUATING SCIENTIFIC EVIDENCE: AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS, Cambridge University Press (2007) 13 (noting that the legislation ‘does not impose a duty to scrutinize expert testimony for scientific validity’)

⁵³⁶ Australian Law Reform Commission Report, ALRC Report 102, para.9.31 available at <http://www.alrc.gov.au/publications/9.%20The%20Opinion%20Rule%20and%20its%20Exceptions/opinions-based-specialised-knowledge>

⁵³⁷ Gary Edmond & Mehara San Roque, Before the High Court-Honeysett v. The Queen: Forensic Science, ‘Specialized Knowledge’ and the Uniform Evidence Law, 36 Sydney L. Rev. 323,325 (2014)

⁵³⁸ Ibid

⁵³⁹ High Court of Australia, *Honeysett v. R* [2014] HCA 29 (13 August 2014), para.23

For example, in the *Lakatoi* case before the New South Wales Supreme Court, Einstein J took the stance that, under the particular section, a trial judge must examine evidentiary reliability.⁵⁴⁰

The same conclusion regarding the fact that the reliability parameter can be traced in the legal landscape created under the *Evidence Act* was also reached by Justice Higgins in *Lipovac*, heard before the Australian Capital Territory's Supreme Court.⁵⁴¹ On a federal level, the High Court of Australia traced 'a line of authority'⁵⁴² in coming to proclaim the reliability parameter as an element that judges must address when coming to weigh on expert opinions.⁵⁴³

At the same time, Australian jurisprudence did not further elaborate on which subjects require expert opinions and under which standards these opinions should be deemed as reliable. Nevertheless, these two questions came to be gradually addressed in Australian jurisprudence. As logically expected, the question of the thematic span of an expert opinion was addressed before any discussion of the relevant standards unveiled. Regarding which subjects can fall in the realm of an expert opinion, the 'leading'⁵⁴⁴ Australian case on this matter is *Clark v. Ryan*.⁵⁴⁵ In this case, Dixon CJ held that judges should resort to expert opinions in cases where the subject matter 'partakes of the nature of a science as to require a course of previous habit or study in order to obtain a knowledge of it.'⁵⁴⁶ Scholars have deduced through the use of the

⁵⁴⁰ *Lakatoi Universal Pty Ltd & Ors v. Langley Alexander Walker & Ors*, [1999] NSWSC 1336, November 5 1999, at 4. See also the case of *Makita* before the New South Wales Court of Appeal, where the Court noted that the intellectual basis of the expert opinion should be explained (*Makita (Australia) Pty Ltd. v. Sprowles* [2001] NSWCA 305 (14 September 2001), para.85; *Morgan v. R* [2011] 215 A Crim R 33,60, para.138

⁵⁴¹ *Lipovac et al. v. Hamilton Holdings Pty Ltd et al.* [1996] ACTSC 98 (13 September 1996), para.562 (noting that 'the tribunal must be satisfied that it understands the factual assumptions, if any, underlying the expert evidence and the relationship of any such opinion to those facts. The tribunal must satisfy itself as to the existence of the facts supporting the opinion and that the opinion is based on a relevant area of specialized knowledge.')

⁵⁴² Peter McClellan, Admissibility of Expert Evidence under the Uniform Evidence Act, Melbourne, October 2, 2009 at 5 available at <http://netk.net.au/ExpertEvidence/McClellan.pdf>. On these grounds see for example High Court of Australia, *Straker v. R* 15 ALR 103,114 (1977) (per Jacobs J) (rejecting speculation from the expert's part)

⁵⁴³ See for example the High Court's judgment in *Honeysett*, supra note 373 at para. 24 (holding that the expert opinion must not only be based on specialized knowledge but it must be presented also before the Court in such a way that the judges can be able to verify this)

⁵⁴⁴ Stephen Odgers & James Richardson, supra note 648 at 109

⁵⁴⁵ *Clark v. Ryan* [1960] CLR 486

⁵⁴⁶ *Ibid* at 491

phrase ‘nature of a science’ that the expert opinion should rely on scientific principles.⁵⁴⁷ At the same time, these scholars proceeded to note that the particular judgment did not elaborate about the identity of these principles.⁵⁴⁸

The susceptibility of the subject matter to the rendering of an expert opinion was further clarified by the South Australia Supreme Court in *Bonython*⁵⁴⁹ which is often cited by English courts.⁵⁵⁰ In coming to assess whether a witness is competent to give evidence, Chief Justice King held that the judge must take notice of two issues. In his words

‘The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This may be divided in two parts a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge....would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.’⁵⁵¹

⁵⁴⁷ Stephen Odgers & James Richardson, *supra* note 404

⁵⁴⁸ *Ibid*

⁵⁴⁹ *R v. Bonython* [1984]38 SASR 45

⁵⁵⁰ On this see for example the aforementioned case of *Ahmed & Anor v. R*, *supra* note 511. See also UK Supreme Court, *Kennedy (Appellant) v. Cordia (Services) LLP (Respondent) (Scotland)* [2016] UKSC 6, Judgment (10 February 2016), para. 43. For the fact that the Australian impact upon English jurisprudence follows the other way around since more often it is English law and jurisprudence that influence the Australian legal landscape see Alex Castles, *The Reception and Status of English Law in Australia*, 2 *Adelaide L Rev* 1 (1963)

⁵⁵¹ *R v. Bonython*, *supra* note 549

This stance towards expert testimony has been declared by Gaudron J as the classical position of common law on the issue⁵⁵² and has been reiterated in a number of federal High Court judgments.⁵⁵³ Reliability concerns refer only to the field of knowledge that relates to the expert opinion, but not to its application on the facts of the particular case. This, in essence, has given rise to incidents of miscarriages of justice as is the case with Lindy and Michael Chamberlain whose little daughter, Azaria, disappeared from her tent on a camping trip and has never been found.⁵⁵⁴ The Chamberlains claimed that Azaria was taken by a dingo, but their version of the events was refuted in court by expert witnesses and they were convicted in 1982. Nevertheless, new expert evidence came to refute the previous evidence that had been accepted by courts and, ultimately, a Royal Commission that was established to inquire about the case concluded that ‘some of the opinions were based on unreliable or inadequate data.’⁵⁵⁵ Along these lines, scholars pointed out that courts should also start to address issues of the expert opinion’s reliability and they even endorse the Daubert standard.⁵⁵⁶

Such developments caused a gradual shift in Australian jurisprudence to the extent that more recent judgments on a federal level do include assessments of the methodologies of the provided expert opinions.⁵⁵⁷ Moreover, the High Court, in its Expert Evidence Practice Notes issued in 2016, explicitly addresses the reliability of the provided expert opinions.⁵⁵⁸ The importance for judges to take into account the expert’s reliability as well as that of the methodology of the expert’s opinion is starkly demonstrated in section 3 of Annex A. There,

⁵⁵² High Court of Australia, *HG v. R* [1999] HCA 2, para.58

⁵⁵³ Ibid

⁵⁵⁴ On this see Stephen Odgers & James Richardson, *supra* note 648 at 112

⁵⁵⁵ Ibid

⁵⁵⁶ Ibid at 124

⁵⁵⁷ On this, see for example the case of *Minnesota Mining*, relating to patents, where the Federal Court of Australia held that despite the fact that expert opinions were being issued by reliable experts and notwithstanding the reliability of the undertaken methodology, they still could not be deemed admissible as evidence because these experts were offered in advance a copy of the patent. Federal Court of Australia, *Minnesota Mining & Manufacturing Company v. Tyco Electronics Pty Ltd* [2002] FCAFC 315 (18 October 2002), para.45

⁵⁵⁸ Federal Court of Australia, Expert Evidence Practice Note (GPN-EXPT) October 25,2016

under the title ‘Content of Report’, it is stated, inter alia, that the expert must furnish the court with his qualifications that render him eligible to prepare a report, together with ‘the assumptions and material facts on which each opinion expressed in the report is based’, ‘the reasons for and any literature or other materials utilized in support of such opinion’, and ‘any examinations, tests or other investigations on which the expert has relied.’⁵⁵⁹ Similarly, also under the previous legal arrangements drafted by the High Court judges, Practice Note CM7 holds explicitly that the expert’s report must contain both the factual assumptions upon which such a report has been based as well as the reasons behind the expert’s opinion.⁵⁶⁰

The Expert Evidence Practice Notes seem to imply an Australian High Court preference for the Daubert standard, nevertheless, so far, this has not been stated explicitly in the Court’s jurisprudence. One explanation for this may be that Australia’s Federal Court tends to see the issue of reliability as one that is detached from the establishment of a ‘reasoning process’ for the assessment of the provided opinion. Rather, such ‘reasoning process’ is viewed only as an auxiliary means for the Court to attest to whether the witness testified on issues pertaining to ‘specialized knowledge’, as required by section 79 of the *Evidence Act*.⁵⁶¹ Consequently, any Australian judicial references to the concept of reliability have taken place through the lens of the ‘general acceptance test’, without these judicial bodies unequivocally endorsing *Frye*.

For example, in *Osland*⁵⁶² an appeal case from the Supreme Court of Victoria, the High Court had to decide whether the Battered Women’s Syndrome (BWS) was scientifically

⁵⁵⁹ Federal Court of Australia, Expert Evidence Practice Note (GPN-EXPT) October 25, 2016, Annexure A, Section 3 (c), (d),(e) and (g) available at <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt>

⁵⁶⁰ Federal Court of Australia, Practice Note CM7, June 4, 2013 available at <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm7>

⁵⁶¹ Federal Court of Australia (Full Court), *Ocean Marine Mutual Insurance Association (Europe) OV v. Jetopay Pty Ltd* [2000] FCA 1463 (27 November 2000), para. 23; Supreme Court of New South Wales, *Makita (Australia) Pty Ltd v. Sprowles* [2001] NSWCA 305 (14 September 2001) para.85

⁵⁶² *Osland v. R* [1998] HCA 75

substantiated in order to form a ‘reliable body of knowledge or experience.’⁵⁶³ To this question, Kirby J, palpably expressed the Court’s stance in rejecting the appeal by holding that BWS should not be viewed as ‘a universally accepted and empirically established scientific phenomenon.’⁵⁶⁴ While the Court does not explicitly mention *Frye*, the judgment’s phraseology is starkly reminiscent of *Frye*,⁵⁶⁵ in tandem with a similar practice that seems to be prevalent among Australian courts.⁵⁶⁶ At the same time, even before the adoption of *Daubert* in the United States, Australian jurisprudence did not explicitly refer to *Frye* giving rise to arguments that Australian courts were never amenable to a *Frye* standard approach in the first place.

Additionally, in *Gilmore*⁵⁶⁷ the New South Wales Court of Appeal concluded that spectrographic voice analysis was a ‘recognized field in which a properly qualified expert can give admissible evidence.’⁵⁶⁸ The need for the epistemological field to be ‘recognized’ echoes *Frye*’s ‘general acceptance’ test. At the same time, while quoting a passage from the *United States v. Baller* judgment,⁵⁶⁹ Street CJ stressed that it was important that provided opinions are testable and are attained through scientific, objective procedures.⁵⁷⁰ The relevant passage that the Australian court judgment quotes closes with the notice that ‘absolute certainty of result or unanimity of scientific opinion is not required for admissibility.’ As a result of this notice, Street CJ concluded that to recognize ‘a degree of risk of inaccuracy and to recognize a need for caution in the use of evidence, is far from treating the evidence as inadmissible.’⁵⁷¹

⁵⁶³ Ibid, para.53

⁵⁶⁴ Ibid, para.165

⁵⁶⁵ For the fact that psychological syndromes including the BWS may not be susceptible to the definitive testing that *Daubert* seems to require see Stephen Odgers & James Richardson, *supra* note 404 at 119; Ian Freckelton, *When Plight Makes Right- the Forensic Abuse Syndrome*, 18 *Crim. L. J.* 29, 34 (1994)

⁵⁶⁶ On this see Paul Giugni, *Runjanjic v. R*, 14 (4) *Sydney L. Rev.* 511, 514-15 (1992) (discussing the approach of King CJ in the case of *Runjanjic*)

⁵⁶⁷ *R v. Gilmore* [1977] 2 NSWLR 935

⁵⁶⁸ Ibid at 939

⁵⁶⁹ *United States v. Baller* 519 F2d 463,466-467 (1975)

⁵⁷⁰ *R v. Gilmore*, *supra* note 567 at 939

⁵⁷¹ Ibid at 941

Such statements and the inclusion of these *Daubert*-like characteristics in a judgment that has not explicitly endorsed *Frye*, prompted scholars to argue that any references to the need for the scientific opinion to be recognized should not lead to the conclusion that Australian courts adopt *Frye*, rather that they consider this parameter important the same way *Daubert* does.⁵⁷²

This inclination of Australian jurisprudence towards *Daubert* is more palpably seen in the jurisprudence of the Supreme Courts of the Australian States comprising the Australian federation. Among these Courts, some endorse *Daubert* implicitly rather than explicitly.⁵⁷³ Other judgments issued in chronological vicinity with the proclamation of the standard in the U.S. raise the question of whether the parameter of the novelty of expert evidence should constitute a reason for judges to proclaim that the relevant evidence is inadmissible or such novelty should be considered by judges under the free probative discretion they enjoy in the evaluation of the different evidence presented before them.⁵⁷⁴ Some Supreme Courts, like that of New South Wales, seem to endorse the view that if the *Daubert*-inspired rules governing an expert witness's testimony and contained in the Expert Witness Code of Conduct are not respected, this should not lead to the inadmissibility of the provided evidence.⁵⁷⁵

⁵⁷² Stephen Odgers & James Richardson, *supra* note 404 at 123

⁵⁷³ Supreme Court of Western Australia, Re: Dr Ken Michael Am; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor [2002] WASCA 231 (23 August 2002); Supreme Court of the Northern Territory, *Murdoch v. R* [2007] NTCCA 1 (10 January 2007) paras. 287, 289, 300 (citing the Court of Appeal which noted that the expert witness had not published any of her scientific assertions, the Supreme Court itself further examining whether the expert witness had sufficiently applied her methodology on the facts of the case and coming to the conclusion that her testimony should be rejected because it was not based on scientific premises)

⁵⁷⁴ *Lipovac et al. v. Hamilton Holdings Pty Ltd et al.* [1996] ACTSC 98 (13 September 1996), paras. 546-547 (Justice Higgins seeing novel expert evidence as falling in the judge's free probative discretion). For the fact that Australian jurisprudence in the '70s viewed the question also of whether an opinion is based on facts as a question that refers to the weighing of the evidence rather than to its admissibility see *Millirpum v. Nabalco Pty Ltd* [1971] 17 F.L.R. 141,162-63

⁵⁷⁵ Supreme Court of New South Wales-Court of Criminal Appeal Decisions, *Wood v. R* [2012] NSWCCA 21 (24 February 2012), para.728. The Expert Witness Code of Conduct applicable in New South Wales can be found at Schedule 7 of the Uniform Civil Procedure Rules 2005 and similar to other Codes of Conduct mentioned in this thesis, it contains the stipulation that the expert witness must inter alia provide the court with the examinations and investigations upon which he has relied to reach his conclusions and the literature that supports the expert's findings. On this see Uniform Procedure Rules 2005-Schedule 7, art.3 available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/sch7.html

On the other hand, there is a category of cases that seem to endorse, albeit non-explicitly, a *Daubert*-like test in the admissibility of expert evidence. For example, in *Re Michael*, before the Western Australia Supreme Court⁵⁷⁶ concerning whether the Regulator of Western Australia had erroneously interpreted the National Third Party Access Code for Natural Gas Pipeline Systems, the Court had to rely on expert opinions in order to interpret some economic terms that appeared inside the Code.⁵⁷⁷ While the Court found that there was no ‘uniform, accepted and certain’ meaning to these terms,⁵⁷⁸ it proceeded to hold that this fact should not bar the Court from holding the particular expert testimonies as admissible. On these grounds, echoing *Daubert*, the Court placed the focus on the fact that these terms, as appearing in the Code, seemed to imply ‘a principle or theory, the essential tenets of which are widely understood, though there need not be uniform acceptance of them.’⁵⁷⁹

Nevertheless, despite this clear tendency among Australian courts towards the endorsement of the *Daubert* standard, the fact that the Australian High Court has not taken a clear stance on the issue coupled with the indications that Australian jurisprudence, at least till the mid-80s, endorsed *Frye*⁵⁸⁰ and the fact that ‘Australia has had perhaps the most vociferous debate outside the United States’⁵⁸¹ has rendered the impression among scholars and judges that, when it comes to the reliability test, ‘the issue has not been determined by the highest courts in Australia.’⁵⁸²

⁵⁷⁶ Supreme Court of Western Australia, *Re: Dr Ken Michael Am*, supra note 573, paras. 6-10

⁵⁷⁷ *Ibid*, para.106

⁵⁷⁸ *Ibid*, para.105

⁵⁷⁹ *Ibid*, para.107

⁵⁸⁰ Ian Freckelton, supra note 531 at 369

⁵⁸¹ David Bernstein, *Junk Science in the United States and the Commonwealth*, 21 *Yale J. Int’l. L.* 123 (1996)

⁵⁸² Ian Freckelton, *Doctors and Forensic Expertise in DISPUTES AND DILEMMAS IN HEALTH LAW* (Ian Freckelton & Kerry Petersen eds., The Federation Press, 2006) 412. See also Peter McClellan, *Admissibility of Expert Evidence under the Uniform Evidence Act*, Melbourne, October 2, 2009 at 7 available at <http://netk.net.au/ExpertEvidence/McClellan.pdf> (noting that some courts in Australia have endorsed *Frye*, others require the court to examine the reliability of the source of the evidence and others enforce elements of both the *Frye* as well as of the *Daubert* standard.)

This evolution of the Australian jurisprudence from the classical stance taken by the English courts to one more accommodating of Daubert, can be seen also in New Zealand courts. In line with the general stipulations on expert evidence that common law has undertaken in its traditional form as described above for England and Australia, before 1980, New Zealand courts did not place traditionally any emphasis on the nature and reliability of the opinion itself, but rather, on the scientific credentials of the testifying expert.⁵⁸³ This came to change after 1980 with New Zealand courts adopting the stance that the provided expert opinion should also be reliable. More characteristically, this was demonstrated in *Makoare*, where the New Zealand High Court held that expert opinion should be based on supporting literature or other verification grounds in order to be deemed admissible.⁵⁸⁴ This reliability parameter was traditionally understood as referring to a ‘sufficiently recognized branch of science’ similar to the U.S. *Frye* approach.⁵⁸⁵ Nevertheless, after the adoption of the Daubert standard by the U.S. Supreme Court, the New Zealand High Court equally endorsed *Daubert*, albeit tacitly, both in its Code of Conduct as well as in a number of cases.⁵⁸⁶

For example, in *Calder*⁵⁸⁷ a case, decided in 1995, that concerned the alleged attempted murder of a man by his ex-partner, incriminating evidence included what the test experts had undertaken from the victim’s hair as proof that a by-product of acrylamide could be traced. The

⁵⁸³ Karen Belt, Novel Scientific Evidence and Judicial Gatekeeping: *R v. Calder and Daubert v. Merrell Dow Pharmaceuticals Compared*, 28(2) Victoria University of Wellington L. Rev. 399 (1999)

⁵⁸⁴ *R v. Makoare* [2001] 1 NZLR 318,324

⁵⁸⁵ *R v. B* [1987] 1 NZLR 362,367

⁵⁸⁶ The Code of Conduct includes the stipulations that must be present in order for expert testimonies to be admitted as evidence. It requires the expert to inter alia specify the investigations he has undertaken and the materials he has relied upon in order to reach his conclusion. On this see G D Clews, Responsibilities of an Expert Witness. Paper for the 2004 Tax Conference, 15-16 October 2004, Christchurch, New Zealand available at <http://www.taxcounsel.co.nz/Resources/Publications+papers+and+commentary/Responsibilities+of+an+Expert+Witness.html> . See also, Ian Freckelton, Doctors and Forensic Expertise in DISPUTES AND DILEMMAS IN HEALTH LAW (Ian Freckelton & Kerry Petersen eds., The Federation Press, 2006) 412

⁵⁸⁷ *R v. Calder*, Unreported, April 12 1995, High Court, Christchurch Registry T 154/94 cited in Karen Belt, Novel Scientific Evidence and Judicial Gatekeeping: *R v. Calder and Daubert v. Merrell Dow Pharmaceuticals Compared*, 28(2) Victoria University of Wellington L. Rev. 399 (1999)

defence asked the Court not to admit these tests as evidence on the grounds that they were based on an unreliable novel scientific approach.⁵⁸⁸ Tipping J, coming to conclude that there was no direct authority in New Zealand when it came to the admissibility of expert evidence, drew from the Daubert standard in order to voice his stance that judges should not examine whether a scientific opinion was generally accepted in order for the latter to be deemed reliable.⁵⁸⁹ Rather, the expert opinion should pass a ‘minimum threshold of reliability,’ which would be asserted each time by the jury,⁵⁹⁰ without the Court providing any further criteria on how such a threshold assessment would take place.⁵⁹¹ In coming to reach his conclusion in *Calder*, Tipping J found support in a discussion paper produced by the New Zealand Law Commission which stated that not only should generally accepted scientific theories be admitted as evidence, but also that ‘newly developed’ theories and theories representing the views of a minority could still be deemed to be reliable.⁵⁹² Coming to adopt a *Daubert*-inspired approach in *Calder* and again in *Brown*⁵⁹³ the New Zealand High Court rendered an important dynamic, first to the inclusion of the reliability parameter in any expert testimony assessment and second to the criteria according which such an assessment should take place.⁵⁹⁴

This dynamic was mirrored in the reports issued by the New Zealand Law Commission. These reports continued detail the government’s attempt to codify a field of law, such as the

⁵⁸⁸ For the fact that in the U.S. hair analysis is not deemed to be an established forensic technique see Clive Stafford Smith & Patrick Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?* 27 Columbia Hum. Rts. L. Rev. 227, 234 (1996)

⁵⁸⁹ Karen Belt, *supra* note 583; Bruce Robertson, *Battered Woman Syndrome: Expert Evidence in Action*, 9(2) Otago L. Rev. 277, 298 (1998)

⁵⁹⁰ *R v. Calder*, *supra* note 587; Karen Belt, *supra* note 583

⁵⁹¹ Erica Beecher-Monas, *EVALUATING SCIENTIFIC EVIDENCE: AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS*, Cambridge University Press (2007) 13

⁵⁹² New Zealand Law Commission *Evidence Law: Expert Evidence and Opinion Evidence-Preliminary Paper No.18*, Wellington, 1991

⁵⁹³ *R v. Brown*, Unreported, September 19, 1997, Auckland Registry, High Court, T/126/95 [cited in Ian Freckelton, *Doctors and Forensic Expertise in DISPUTES AND DILEMMAS IN HEALTH LAW* (Ian Freckelton & Kerry Petersen eds.) The Federation Press, 2006, 412

⁵⁹⁴ Andreas Kapardis, *PSYCHOLOGY AND LAW: A CRITICAL INTRODUCTION*, Cambridge University Press (3rd ed., 2009) 248

law of evidence which was perceived to be ‘chaotic.’⁵⁹⁵ In 1999, the Commission penned its report and a proposed act, named the Evidence Code, which could potentially be adopted by the New Zealand parliament. This Code included a Commentary in which the Commission brought its views on the relevant interpretation of the clauses it proposed.⁵⁹⁶ In this proposed draft, section 23, entitled Admissibility of Expert Evidence, stipulated that expert evidence should be provided by a qualified expert and that such evidence was to be ‘substantially helpful.’ The Commission, citing *Calder and Brown*, proceeded to note that both judgments referred to the Daubert standard. The Commission also stated that, in coming to assess the provided expert opinion’s reliability, the New Zealand High Court considered it useful to examine whether or not the expert’s scientific theory was, or had been, subject to scientific review and publication, if its error rate was known, and if it had been accepted widely by the scientific community.⁵⁹⁷

The emphasis placed on the importance of provided opinions being of ‘substantial help’ to judges and the whole *Daubert* philology of the ‘substantial help’ requirement is also endorsed by the 2006 *Evidence Act*. Ultimately, this Act put an end to the decades’ quest of codification of New Zealand’s law of evidence. As stated in the first paragraph of section 25 in the Act,

‘An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in

⁵⁹⁵ Sarah Croxford, Has the Evidence Act Been a Successful Codification? Is it a True Code? LLM Research Paper, Victoria University of Wellington, Faculty of Law, 2015, VI available at <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5114/paper.pdf?sequence=1>

⁵⁹⁶ New Zealand Law Commission, Evidence Report 55-Volume 1, Reform of the Law, Wellington, 1999 available at <http://www.nzlii.org/nz/other/nzlc/report/R55/>

⁵⁹⁷ Ibid, section 23, no.100

understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.’⁵⁹⁸

It is noteworthy that the above paragraph does not provide any guidelines on how expert evidence is to be assessed. At the same time, following the line of the Law Commission, New Zealand courts have explicitly taken the stance that whether the specific expert evidence is ‘substantially helpful’ or not should be seen as utterly tied to the question of whether it is reliable and can thereby, be admitted by the court. For example, in *Shepherd v. R* concerning the robbery of a bar, the Crown Prosecution’s expert witness compared images taken from CCTV during the robbery with still photographs of the defendant while in custody, in order to argue that the defendant was the culprit.⁵⁹⁹

In coming to assess whether the expert’s testimony could be considered substantially helpful, the rhetoric question was asked of whether the evidence was not substantially helpful because it was unreliable. The Court of Appeal referred to the fact that the defence team tied the helpfulness of the expert’s testimony with issues concerning its reliability, such as the fact that it was not based on a statistical database and that there were alleged technical flaws in the process and the methodology endorsed by the expert witness.⁶⁰⁰ The Court of Appeal proceeded to adopt elements of the *Daubert* reliability criterion in coming to discuss how the judge should evaluate the admissibility of expert evidence. Strongly echoing *Daubert*, the Court referred to the role of the national judge as a ‘gatekeeper’ when it comes to the admission of evidence.⁶⁰¹ It further held that the judge is meant to evaluate the quality of the evidence

⁵⁹⁸ Evidence Act 2006, Section 25(1) available at <http://legislation.govt.nz/act/public/2006/0069/40.0/DLM393600.html>. On this see also the pronouncement of the New Zealand Supreme Court that ‘if expert opinion evidence does not meet the standard of ‘substantial helpfulness’ set by s.25(1), it is not admissible.’ (R. Gwaze [2010] NZSC 52, para.49 available at http://img.scoop.co.nz/media/pdfs/1005/SC_93_2009_R_v_Gwaze_Criminal_Appeal.pdf)

⁵⁹⁹ *Shepherd v. R* [2011] NZCA 666 at 3 available at <http://www.austlii.edu.au/cgi-bin/sinodisp/nz/cases/NZCA/2011/666.html?stem=0&synonyms=0&query=Shepherd%20v.%20R>

⁶⁰⁰ Ibid at 35

⁶⁰¹ Ibid at 37

before he or she reaches any decision on its admissibility and that such assessment of evidence may include, inter alia, ‘the validity of the expert’s methodology.’⁶⁰² Ultimately, the Court concluded that this particular expert testimony should be deemed as introducing pieces of evidence that were admissible.⁶⁰³ In the Court’s words, the evidence was ‘plainly relevant, cogent and detailed’ and it ‘was clear that the images analysed were sufficiently reliable’ to permit the expert to reach his conclusions.⁶⁰⁴

Whereas Australia and New Zealand are in geographical vicinity and it could be argued that they could easily enter into a judicial dialogue on the question of whether they should assess expertise according to Frye or Daubert, Canada is another major Commonwealth state which belongs to the adversarial criminal tradition although similar to continental law arrangements, in Canada, experts are considered helpers of the Court and are meant to elucidate issues about which juries and judges hold no knowledge.⁶⁰⁵ This was pronounced by the Canadian Supreme Court in the early 80s in *Abbey* and was later reiterated in *Beland & Phillips*.⁶⁰⁶ It follows from this that expert testimony can be denied if it is deemed not essential in order for the judge and the jury to form their opinions on a contested issue.⁶⁰⁷

Following the adversarial tradition, Canadian courts also found themselves having to address issues concerning the experts’ impartiality. In that sense, it is interesting that rather than resorting to solutions provided by English law, the Canadian courts noted the vicinity with the U.S. and paid notice to the fact that the same problems were recorded in the U.S. legal

⁶⁰² Ibid

⁶⁰³ Ibid at 88

⁶⁰⁴ Ibid

⁶⁰⁵ Pierre Patenaude, De l’Expertise Judiciaire dans le Cadre du Proces Criminel et de la Reserche de la Verite: Quelques Reflexions, 27 R.D.U.S. 1,10 (1996-97)

⁶⁰⁶ *R v. Abbey* [1982] 2 S.C.R. 24, 42; *R v. Beland & Phillips* [1987] 2 S.C.R. 398,434 (La Forest J. speaking about the ‘human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science)

⁶⁰⁷ *R v. Abbey*, ibid; *R v. Beland & Phillips*, ibid

order.⁶⁰⁸ Conceding to this fact,⁶⁰⁹ shortly after *Daubert* was decided in the U.S., the Canadian Supreme Court also came to develop rules governing the admission of expert testimonies. These criteria became palpable in *Mohan*, because they stressed the judges' obligation to examine the scientific reliability of the provided experts' reports and resembled those in *Daubert*.⁶¹⁰

Mohan was a case concerning a paediatrician who was charged for sexual assault on his young female patients, aged thirteen to sixteen.⁶¹¹ The defence attorney called a psychiatrist to testify that the accused, as a paedophile, belonged to a limited and unusual group of individuals.⁶¹² The psychiatrist opined that if the accused had indeed committed all the acts he was charged for, he would be termed as a sexual psychopath.⁶¹³ The trial judge held that the evidence was not admissible as it did not fall in the sphere of expert evidence.⁶¹⁴

In coming to address the admissibility of the provided expert evidence, the Canadian Supreme Court uttered four principles that should be taken into account, namely a) the relevance of the evidence to the facts; b) the necessity of providing such evidence for assisting the judge in reaching a conclusion; c) the absence of any exclusionary rule and; d) the proper qualification of the expert.⁶¹⁵

The need for the provided expert opinion to be relevant raises the need for it to be also reliable. On this, the Court in *Mohan* drew from previous jurisprudence in *Melaragni* where

⁶⁰⁸ On this see *R v. Nielsen* (1985) 16 C.C.C. (3d) 39. See also the remark of the Director of the Toronto Forensic Science Centre that 'the scientist must learn, or at least accept, that the judicial process is not a search for truth in the scientific sense, but rather a search for truth as defined by one or the other of the adversaries' (D. Lucas, The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits, 34 J. Forensic Science 719,722 (1989)

⁶⁰⁹ *R v. Mohan* [1992] 2 S.C.R. 9, 21

⁶¹⁰ *Ibid* at 9

⁶¹¹ *Ibid* at 13-14

⁶¹² *Ibid* at 14

⁶¹³ *Ibid* at 15-16

⁶¹⁴ *Ibid* at 11

⁶¹⁵ *Ibid* at 10,20

Canadian courts applied a reliability test to what the Court termed a ‘new scientific technique or body of scientific knowledge.’⁶¹⁶ In turn, echoing the Daubert standard, these reliability concerns brought forth the need for scientific evidence to be grounded on scientifically valid grounds. Nevertheless, distancing a bit from the approach of the U.S. Supreme Court, the Canadian Supreme Court reached the need for criteria of scientific validity to be established not through a doctrinal, but through a teleological, cost-benefit analysis, resembling the economic approach of law.

In particular, the Supreme Court held that expert evidence should be deemed admissible if the benefit of doing so exceeded the cost.⁶¹⁷ The cost was not to be seen on financial terms but as referring to the impact such admission of the evidence will have on the trial.⁶¹⁸ If its admission will have a gross impact to the extent that the evidence is not substantiated enough to be able to prove beyond a reasonable doubt the innocence or guilt of the defendant, such evidence should be rejected by the judge.⁶¹⁹ When it comes to scientific evidence, such grossly-founded evidence would entail evidence that was not based on an established scientific methodology or on an uncertain technique.⁶²⁰

While reference to concerns tied to the undertaken methodology or technique are highly reminiscent of the *Daubert* parameter, the Canadian Supreme Court in *Mohan* did not explicitly endorse *Daubert*.⁶²¹ Yet any thoughts of the Court adopting *Frye* in *Mohan* are refuted by the fact that the judges hold that trial judges are to assess each time the validity of a scientific opinion rather than refer to the prevailing views among the scientific community.⁶²²

⁶¹⁶ Ibid at 21-22 (citing *R v. Melaragni* (1992) 73 C.C.C. (3^d) 348,353)

⁶¹⁷ Ibid at 20-21

⁶¹⁸ Ibid at 21

⁶¹⁹ Ibid at 20-21

⁶²⁰ Ibid at 21

⁶²¹ Pierre Patenaude, supra note 605 at 22 (proposing Daubert as the standard through which the feasibility of a new scientific stance or technique should be measured)

⁶²² *R v. Mohan*, supra note 609 at 20

The Supreme Court conclusions in *Mohan* were applied by the same Court in *R v. J. L.-J.*⁶²³ In this case, the accused was convicted on first instance for sexual assault on two young male children. The first instance court did not accept the testimony from a psychiatrist who, testifying as an expert witness, asserted that the accused belonged to one of the groups mentioned in *Mohan*. The Court of Appeal reversed the trial court's conclusion regarding the admissibility of the expert's testimony. Siding with the trial court, the Canadian Supreme Court noted that the expert witness had not persuaded the court that his methodology of the tests administered to the accused was reliable.⁶²⁴

Whereas Australia and New Zealand are in close geographic vicinity with each other and Canada is close to the U.S., it could be argued that the geographic position played a role to these countries either following each other's example and drifting away together from the classical English approach, as could be the case with Australia and New Zealand or doing so due to being too close to the U.S. and too much influenced by it rather than by England in the case of Canada. Yet, it is interesting to see whether Commonwealth countries equally thousands of miles away from England but also not close to the U.S., would opt to lean towards the U.S. Daubert standard or would aspire to undertake the classical common law approach as this is articulated in the English jurisprudence discussed above.

Quite interestingly, both in the cases of South Africa and India which were taken as examples of such countries, courts have appeared ready to assess also the reliability of the undertaken method of expertise along a Daubert mode. This is the case despite the fact that neither India nor South Africa have only common law influences in their legal systems. In

⁶²³ *R. v. J.L.-J.*, [2000] 2 SCR 600,2000, SCC 51 (CanLII)

⁶²⁴ *Ibid* at 1

India, although there has been a debate on whether this should be the case,⁶²⁵ in criminal proceedings, Indian courts follow the adversarial system rather than the inquisitorial one.⁶²⁶ Still, the Indian Code of Criminal Procedure has provisions that relate to the inquisitorial system.⁶²⁷ When it comes to witnesses and the law of evidence, this means that although the summoning of witnesses to testify in the criminal trial is a task bestowed upon the parties, the judge also has the right to examine any person as a witness even if such person has not been relatively summoned by the parties.⁶²⁸

The discussion regarding the place of the Daubert standard in India's criminal proceedings encompasses the perusal of both the Code of Criminal Procedure and the Indian Evidence Act.⁶²⁹ The latter, a piece of legislation dating from 1872 and the days of the British Raj, contains instructions on how evidence is to be assessed by courts in both criminal and civil law proceedings. When it comes to the role of experts in trials, the Evidence Act focuses on the 'relevance' aspect of such testimony. As stated in section 45 of the Act on scientific matters, the opinions of persons competent to provide them are relevant for the clarification of any disputed points. This is similar to the wording of section 702 in the U.S. Rules of Evidence. Yet, whereas in the U.S. Rules of Evidence the Daubert standard is introduced in the discussion on the epistemological validity of the furnished opinions on reliability grounds, such a discussion in the Indian Evidence Act remains in the realm of the 'relevance' framework. Additionally, section 51 states that 'whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.' For example, the scenario is given

⁶²⁵ On this see the discussion of the issue in Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Vol. 1, March 2003 at 27-28 available at https://mha.gov.in/sites/default/files/criminal_justice_system.pdf

⁶²⁶ Ibid at 23

⁶²⁷ On this see Yash S. Vijay, *The Adversarial System in India: Assessing Challenges and Alternatives* (2012) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147385&download=yes

⁶²⁸ Indian Code of Criminal Procedure 1973, section 311

⁶²⁹ The Indian Evidence Act 1872 available at <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxrbWxzYXJjaGl2ZTF8Z3g6YTEwZWQ5YjI4OWI0ZjBm>

where an expert ‘may give’ as mentioned ‘an account of experiments performed by him for the purpose of forming his opinion.’ The use of the word ‘may’ instead of ‘must’ together with the treatment of the issue as a matter concerning the relevancy rather than the reliability of the testimony distance the Law of Evidence Act approach from that introduced by the Daubert standard. Moreover, section 293 of the Indian Code of Criminal Procedure stipulates that a report compiled by a government scientific expert may be used as evidence without the provision proceeding to articulate on whether and how such report is to be assessed by the judge.

This assessment gap is addressed by the Indian Supreme Court.⁶³⁰ Already in 1992, almost five years before the U.S. Supreme Court came to coin the Daubert standard, the Indian Supreme Court judges held that ‘the expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court, although not an expert, may form its own judgment on those materials after giving due regard to the expert’s opinion.’⁶³¹ Of particular importance is the fact that this judicial pronouncement came together with the judges’ assertion that they would evaluate the expert’s opinions and reports in conjunction with the victim’s testimony, in that case a victim of rape. For the Indian Supreme Court expert opinions are meant to verify and buttress or not the victim’s account of the event, the same way the thesis envisions expert reports to play a similar role in international criminal proceedings.

Similarly, in South Africa the legal framework governing expert witnesses contains both adversarial as well as inquisitorial elements. Thus, following the common law paradigm,

⁶³⁰ M.P. Kantak et al., Utility of Daubert Guidelines in India, 26(3) J. Indian Academy of Forensic Medicine 110,112 (2004)

⁶³¹ Supreme Court of India, *Madan Gopal Kakkad v. Naval Dubey And Anr* on 29 April, 1992, 1992 SCR (2) 921 available at <https://indiankanoon.org/doc/1314858/>

South African courts have held that the testifying experts must show that they have knowledge or skill in a particular field but they do not have to be professionally qualified in order to undertake such a task.⁶³² On the other hand, and more similar to arrangements in inquisitorial systems,⁶³³ South African courts have clarified that an expert is seen as a helper to the judge.⁶³⁴

At the same time, the role of ‘helper’ has not deterred courts from actually examining on their own issues that pertain to science. In coming to do so, the South African Supreme Court has crowned the reliability of the evidence as the defining parameter. This is exemplified in the way the Court has come to decide in different chronological phases on the question of whether the sniffing by a police dog of certain footprints, which ultimately led to the arrest of the accused, could be accepted as admissible evidence.⁶³⁵ In *R v Trupedo* decided in 1920,⁶³⁶ the Court held to the negative. Innes CJ came to note that such evidence needed to be based on ‘scientific and accurate knowledge’ of the dogs’ behaviour, and since such knowledge was lacking from the Court’s part, it could not but hold the presented evidence as inadmissible.⁶³⁷

This stance changed in the 1980s. In *Shabalala*,⁶³⁸ the Supreme Court held that the Court’s utterance in *Trupedo* should be seen as tied to the exigencies of the era and the ability at that

⁶³² *Menday v Protea Assurance Co. (Pty) Ltd*, 1976 1 SA 565 (ECD)

⁶³³ Lirieka Meintjes-Van der Walt, The Proof of the Pudding: The Presentation and Proof of Expert evidence in South Africa, 47 J. African L. 88,92 (2013)

⁶³⁴ For an encapsulation of this stance see the Supreme Court of Appeal judgment in *S v. Huma* 1995 1 SACR 409,410 (W)

⁶³⁵ For the fact that the South African’s court stance on whether animal behaviour could be the basis of reliable evidence influenced the position undertaken also by other supreme courts in the region see the position of the High Court of Namibia in coming to ponder over whether it could base its judicial assessment on the behaviour of certain cows. (High Court of Namibia, Case No. 4/2001, The State v. Jonas Hepute, Judgment, 21 June 2001 at 9-14)

⁶³⁶ For a discussion of the facts of the case see Farai Faifi, Should the Identification of a Suspect by a Trained Police Dog continue to bear relevance in the South African law of evidence? January 2013, p.3 available at https://www.researchgate.net/publication/259621476_Should_the_identification_of_a_suspect_by_a_trained_police_dog_continue_to_bear_relevance_in_the_South_African_law_of_evidence

⁶³⁷ *R v. Trupedo* 1920 AD 58,63-64

⁶³⁸ Supreme Court of South Africa (Appellate Division), 450/85 *Solomon Msuthu Shabalala v. R*, Judgment of 28 August 1986. For a discussion of the facts of the case see Farai Faifi, Should the Identification of a Suspect by a Trained Police Dog continue to bear relevance in the South African law of evidence? January 2013 at 4 available at https://www.researchgate.net/publication/259621476_Should_the_identification_of_a_suspect_by_a_trained_police_dog_continue_to_bear_relevance_in_the_South_African_law_of_evidence

time to interpret dogs' behaviours. Since then though, science progressed to the extent that, at the time of the *Shabalala* judgment, the Court deemed that such evidence based on dog sniffing could not be deemed 'untrustworthy', but rather should be admitted as reliable.⁶³⁹ The South African is reminiscent of the approach also courts in Cyprus take-another Commonwealth member- regarding the need for the judges to be persuaded about the authenticity and the scientific character of an undertaken method.

For example, in a criminal case reaching the country's Supreme Court and concerning allegations that police officers had illegally exerted physical violence over certain individuals, the whole incident was video- recorded and two experts were called in to assess whether the video produced was authentic or not.⁶⁴⁰ One expert held that chances were that the tape was authentic although he could not say this on a determinative basis. The second expert was absolute and held that the tape was authentic.⁶⁴¹ The Court of lower instance ultimately ruled that the authenticity of the tape could not be determined. In order to reach this conclusion, the lower instance judges casted doubts on the absolute conclusion reached by the second expert by referring to methodological elements of his analysis. In particular, the judges noted how the second expert did not explain *in concreto* the methodology he followed in the particular case but sufficed to just refer the Court to previous writings of his on the subject.⁶⁴² The case reached the Supreme Court which similar to a Daubert standard mode, reviewed the scientific methodology pursued by the experts and held that their methodology as well as the conclusions reached could bolster the claim that the tape was authentic. Along these lines, the

⁶³⁹ Ibid at 25

⁶⁴⁰ Anotato Dikastirio Kiprou, Deyterovathmia Diadikasia, Genikos Isageleas tis Dimokratias v. Andrea Eustathiou et als., No.56/2009-65/2009 (in Greek) [Supreme Court of Cyprus, Proceedings on Appeal, The General Attorney of the Republic v. Andrea Eustathiou et als., No.56/2009-65/2009], Judgment, 29 March 2010 available at

[http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/378D708AFE536D84C22576F6001F263A/\\$file/56-09-1.pdf](http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/378D708AFE536D84C22576F6001F263A/$file/56-09-1.pdf)

⁶⁴¹ Ibid

⁶⁴² Ibid

Supreme Court ordered the case retrial.⁶⁴³ In another criminal case concerning the beating of an individual by the defendants, the District Court of Ammohostos resorted to the expert evidence of doctors in order to assess the head injuries the victim had sustained. Along these lines, the Court discredited the expert opinion of one of the doctors because he had not conducted an examination of the case on his own but had blindly relied on the findings of one of the other doctors serving as experts.⁶⁴⁴

All these case from these three different Commonwealth jurisdictions which can't be argued that they share much apart from their Commonwealth membership, demonstrate how even among Commonwealth members the traditional stance of English law regarding expert witnesses tends to give its place to one that favours more the review of the reliability not only of the persons posing as experts but also of the scientific conclusions themselves. The next section will examine whether this is true also in the case of Ireland and Israel.

5.4 The cases of Ireland and Israel and the question of the Daubert standard application in non-Commonwealth countries

Whereas the previous section explored the impact of the English law arrangements on Commonwealth states, the current one wishes to shift the focus upon states which were once part of the British Empire, but are not current Commonwealth members in order to see whether the English arrangements continue to play a prominent role on how these jurisdictions look at the role of experts in criminal trials. Ireland and Israel will be discussed as two such examples.

⁶⁴³ Ibid

⁶⁴⁴ Eparhiako Dikastirio Ammohostou, No. 4155/08, *Astinomia v. Marios Karagiannas et al.*, (District Court of Ammohostos, No.4155/08, *Police v. Marios Karagiannas et al.*) (in Greek), Judgment, 27 October 2010 (with reference to further jurisprudence) available at <http://www.lyingbuilder.com/2nd-assault-court-date-27-%CE%BF%CE%BA%CF%84%CF%89%CE%B2%CF%81%CE%AF%CE%BF%CF%85-2010/>

Indeed, heavily influenced by their English peers, Irish courts have traditionally only viewed the issue of expert evidence through the lens of relevancy. Yet in the aftermath of *Daubert*, in its 2008 report, the Irish Law Reform Commission⁶⁴⁵ examined the possibility of Ireland also adopting the *Daubert* reliability standard in the assessment of evidence.⁶⁴⁶ Explicitly stating the pros and cons of such a move, the Commission's members, including a retired judge of the Supreme Court, solicitors, and a university professor, advocated for such a step.⁶⁴⁷

Irish courts have also related to the need for judges to base their judgments on scientifically reliable evidence. In *The People (DDP) v. Fox*, the Special Criminal Court did not accept as admissible the expert's opinion meant to prove that the defendant had signed a particular document. The Court exerted criticism of the expert due to the fact that he relied only on lower case writing without giving any reasons for doing so and did not proceed to provide any scientific criteria for his opinion.⁶⁴⁸ In *The People (DDP) v. Ramzan* concerning whether one of the defendants accused of drug trafficking was insane, the trial judge refused to declare the expert's opinion as admissible evidence due to the fact that he based it on secondary sources, such as documents and reports, rather than on his own findings.⁶⁴⁹ The Court of Appeal conceded.⁶⁵⁰

In *The People (DDP) v. Kelly*, the defendant sought to overturn a previous murder conviction on the grounds that the confession that had been extracted by the police was not

⁶⁴⁵ The Irish Law Reform Commission was instituted with an Act of Parliament in 1975 and is an independent statutory body. On this see Law Reform Commission Act 1975 (Updated to 30 November 2015) available at <http://revisedacts.lawreform.ie/eli/1975/act/3/revised/en/pdf?annotations=true>

⁶⁴⁶ Law Reform Commission, Expert Evidence, LRC CP52-2008, December 2008 at 121

⁶⁴⁷ Ibid at 122-125,132

⁶⁴⁸ Special Criminal Court, *The People (DDP) v. Fox*, Judgment, 23 January 2002 cited and discussed in Law Reform Commission, Expert Evidence, LRC CP52-2008, December 2008 at 103

⁶⁴⁹ Court of Appeal, CCA 42/12, *The People (DDP) v. Ramzan*, Judgment, 11 May 2016, para.56 available at <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a39a764c74accd5780257fb60046cb05?OpenDocument> (referring to the trial at first instance)

⁶⁵⁰ Ibid, para.68

penned by him. In order to prove his point, the defendant relied on a new scientific technique called cumulative sum analysis (CUSUM) that could purportedly tell whether a document was authored by one or more persons. Two experts testified before the Criminal Court of Appeal and while one of them held that the CUSUM method was scientifically valid, the other held the opposite.⁶⁵¹ In coming to decide on the matter, the judge held, as a decisive parameter, whether or not the CUSUM method has been published in any peer review journals. The Court noted that the expert supporting the scientific validity of CUSUM had conceded in the cross-examination that the method had not been accepted in any court in the U.S. in the course of a criminal trial and that, once asked about the technique's peer review scientific validity, he had referred to works of his.⁶⁵² The Court concluded, then, that it could not accept CUSUM as a technique that has 'a properly established scientific provenance or that it has achieved the requisite degree of expert peer approval.'⁶⁵³ Thus, the inauguration of the Daubert-inspired peer review element as a decisive parameter for the opinion's reliability is noteworthy.

The reliability of the provided expert opinions and reports has also been an issue before the Irish Supreme Court. In *The People (DDP) v. Connolly*⁶⁵⁴ concerning the conviction of the defendant on drug sale charges, a forensic scientist was called as an expert in order to attest that the packs of powder, found in the defendant's possession, contained amphetamine. The forensic scientist testified before the trial judge that whereas she could not exactly determine the percentage of amphetamine that the packs contained, she had followed an 'accredited laboratory procedure' in its detection.⁶⁵⁵ Notwithstanding the fact that ultimately the Supreme

⁶⁵¹ Criminal Court of Appeal, 116CPA/03, *The People (DDP) v. Kelly*, Judgment, 1 February 2008 available at <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/04214755d99371b2802573e2005eaa0?OpenDocument>

⁶⁵² Ibid

⁶⁵³ Ibid

⁶⁵⁴ Irish Supreme Court, 478/09, *The People (DDP) v. Connolly*, Judgment, 15 February 2011 available at <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/ce7985c21fd9081080257838003a2028?OpenDocument>

⁶⁵⁵ Ibid, para.14

Court struck down the defendant's conviction because it held that the prosecution should have also proved that the quantity of amphetamine present in each pack was significant and not as low as 1%,⁶⁵⁶ it did uphold the validity of the expert witness's testimony and stressed that her results came from an 'accredited laboratory procedure' based on 'a statistical model for sampling.'⁶⁵⁷ In other words, the expert's methodological grounds were deemed important for setting the validity of the provided opinion by reminiscing on the significance *Daubert* attributes to methodology. As a result, the Supreme Court upheld the trial judge's verdict.

As noted in Chapter 4, apart from providing a mode of expert evidence assessment, the *Daubert* discussion is often seen as highly related also to the question of whether the judge should endorse a gatekeeping role. As seen in the previous chapter, much of the criticism directed towards *Daubert* relates to this gate-keeping role and along this line the stance adopted by the Irish jurisprudence on the issue holds a particular interest. To the extent that the relevant case is a civil law rather than a criminal law one, the thesis will deviate on this occasion from its principle not to discuss civil law cases relating to *Daubert*. The case revolved around an accident taking place when a worker tried to clear a blockage in a combine harvester.⁶⁵⁸ While ultimately the accident's victim reached a compromise with his employer and was indemnified by the latter, the employer, in turn, opened judicial proceedings against those who had leased and supplied him the harvester. The employer argued that the machine was defective in the first place.⁶⁵⁹ On these grounds, experts were called in in order to assess how the accident took place and whether this was due to a deficiency with the harvester.⁶⁶⁰

⁶⁵⁶ Ibid, paras.32-35

⁶⁵⁷ Ibid, paras.24-25

⁶⁵⁸ Irish Supreme Court, 66/2008, *Wright v. AIB Finance & Leasing Ltd*, Judgment, 11 December 2013 available at <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/f0d4ced36e2c0f7c80257c3e005b3394?OpenDocument>

⁶⁵⁹ Ibid paras.1.1 & 1.2

⁶⁶⁰ Ibid paras.6.3-6.5

The existence of different expert testimonies raised questions of whether they were, in fact, reliable, as their reliability was conceded by the parties themselves as a *sine qua non* condition for the admissibility of these expert opinions as evidence.⁶⁶¹ Along these lines, one of the counsels proposed to the trial judge that a ‘threshold of reliability’ should be introduced for the assessment of the provided testimonies.⁶⁶² When called by the Court to further elaborate on what this threshold would include, the counsel explicitly referred to elements put forth by *Daubert*, namely ‘if the opinion is supported by scientifically valid principles and criteria which enable the judge to test the accuracy of the expert’s conclusions’ and ‘whether the proposition advanced by the expert is both capable of being empirically tested and has, if practicable, been tested by the expert.’⁶⁶³ The Court, without being averse to the idea that expert evidence needs to be scientifically reliable, refused to endorse a reliability threshold and left the question open.⁶⁶⁴

Ultimately, this is also how the Law Reform Commission came to view the question of the *Daubert* introduction in Irish law. In its 2016 Report, the Commission deemed it necessary to clarify that, while it supported the introduction of the reliability parameter in Irish law, it did not advocate the adoption of the *Daubert* standard to the extent that this would mean the endorsement of a certain threshold test which scientific evidence should meet and the responsibility of the judge to be a gatekeeper of such evidence.⁶⁶⁵ In that sense, the Irish Law Reform Commission made clear the distinction between the reliability component, on the one hand, and the role of the judges as gatekeepers on the other. It thus pointed to the fact that the

⁶⁶¹ Ibid, para.6.1

⁶⁶² Ibid, para.6.8

⁶⁶³ Ibid, para.6.10

⁶⁶⁴ Ibid, para.6.12

⁶⁶⁵ Law Reform Commission, Consolidation and Reform of Aspects of the Law of Evidence, LRC 117-2016 at 258-259 (‘In conclusion, the Commission considers that scientific expert evidence should be subject to more rigorous scrutiny and that experts must prove that a cogent scientific methodology underlies their evidence. However, the Commission takes the view that rigorous and exhaustive investigation of the kind set down by *Daubert* and the English Law Commission, places onerous and unrealistic demands on the shoulders of trial judges.’)

national legislator and national courts can plausibly endorse the *Daubert* reliability parameter without this meaning that they will have to also equally adopt the more dubious ‘gatekeeping’ role that *Daubert* came to introduce.

The importance cast on the scientific reliability of the furnished expert opinions and reports in the course of the criminal proceedings is evident also in Israeli law. The Israeli criminal procedure follows the adversarial system and it is the parties rather than the judge which bring in expert opinions to support their claims.⁶⁶⁶ At the same time, whereas the Criminal Procedure Act states that the court can order an expert to submit a written opinion on a matter of scientific or technical expertise,⁶⁶⁷ it does not contain any details on how such an opinion is to be assessed or on the elements it must be contain. On this, it is the Israeli Supreme Court that has held in a number of cases that any expert opinions must be based on scientifically reliable grounds.

For many years, spanning well over the decade of the 80s, Israeli courts tended to admit evidence, including expert evidence, even when it was not reliable.⁶⁶⁸ With the exception of cases referring to polygraph examinations, courts generally did not take the step to establish concrete rules for assessing evidence. The fact that such evidence came from a credible expert and was relevant to the case, was enough in order for it to be admitted to the trial proceedings,⁶⁶⁹

⁶⁶⁶ For a description of the adversarial system and expert evidence in Israeli criminal procedure see Israeli Supreme Court, 5582/09 (Criminal), Anonymous v. State of Israel, Judgment, 20 October 2010, para. 146 available at

https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\09\820\055\04&fileName=09055820_e04.txt&type=4 (in Hebrew)

⁶⁶⁷ Criminal Procedure Act-1982 (Hok Seder Adin Aplili), art. 111 available at

https://he.wikisource.org/wiki/%D7%97%D7%95%D7%A7_%D7%A1%D7%93%D7%A8_%D7%94%D7%93%D7%99%D7%9F_%D7%94%D7%A4%D7%9C%D7%99%D7%9C%D7%99 (in Hebrew)

⁶⁶⁸ Lior Barshak & Tom Kohavi, *Kvod Haadam, Shlilon Hahok veZihronot Mudhakim* (Human Dignity, the Rule of Law and Repressed Memories) (in Hebrew) in *MISHPAT TZEDEK? HAALICH A PLILI BEISRAEL: KISHLONOT VEETGARIM* (A Just Law? The Criminal Procedure in Israel: Failures and Challenges) (Alon Harel ed., 2017) 545, 554-55 (in Hebrew)

⁶⁶⁹ *Ibid*

although in some instances the Israeli Supreme Court did stress the need for some type of expert evidence, like for example videotapes, to be also reliable.⁶⁷⁰

This reliability parameter has been underlined the last few years in a number of Israeli Supreme Court judgments. For example, in 2003, in a rape case and coming to answer the question of what role the DNA could play in determining the rapist's identity, Judge Chesin held that any scientific evidence brought before the Court should be reliable and acceptable by the wider scientific world. Whereas though such an acceptance reference would make someone think that Judge Chesin endorsed *Frye* rather than *Daubert* in the admissibility of expert evidence question, he proceeded to state-echoing *Daubert*- that the scientific theory in question need not be accepted by all the scientific community.⁶⁷¹

In 2010, in a criminal law case concerning a woman who in the age of 26 initiated legal proceedings against her father for acts of rape and incest he performed on her between the age of 6 to 10, the judges had to decide on whether repressed memories could be scientifically valid in order to constitute the basis for the woman's story.⁶⁷² Writing the Court's judgment, Judge Amit explicitly went over the scientific bibliography and referred extensively to cases in the United States in order to reach the conclusion that the repressed memories academic writing established a school of scientific thought ' according to the spirit of *Daubert*'.⁶⁷³ On this account, Judge Amit referred to a previous judgment of the Supreme Court dating from the '90s when Judge Zamir had held that in order for a scientific theory to be deemed as belonging

⁶⁷⁰ See the stance of Judge Barak as cited by Judge Levi in Israeli Supreme Court, 4682/01 (Criminal), Judgment, 10 November 2003, para.7 available at https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\01\820\046\009&fileName=01046820_009.txt&type=4

⁶⁷¹ Israeli Supreme Court, 9724/02 (Criminal), Judgment, 22 October 2003, paras.17-18 available at https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\02\240\097\G06&fileName=02097240_G06.txt&type=4

⁶⁷² Israeli Supreme Court, 5582/09 (Criminal), para.2

⁶⁷³ Ibid, paras.116-128

to a school of thought, it must not necessarily be shared by all experts in the field or its postulations to be regarded as almost certain; rather the important thing was that the proposed view was scientifically reliable.⁶⁷⁴ Based on this, Judge Amit proceeded to accept the repressed memories arguments as a basis for incriminating the father.

The fact that for the Israeli Supreme Court scientific reliability can be demonstrated each time *ad hoc* even if *a priori* the reached conclusions do not abide by the dominant views of the scientific community, echoes *Daubert* rather than *Frye*. Yet, similar to the case of Ireland, the question of whether the need for the judge to assess each time the presented scientific opinions means that he should be awarded also a gatekeeping role, has been more controversial among Israeli judges.

Whereas, judgments like the one penned by Judge Chesin and mentioned above have been seen as endorsing such gate-keeping role,⁶⁷⁵ other Supreme Court judges have hailed to state that in the Israeli legal order, *Daubert* should be seen as part of the question of how much weight is to be attached to the presented evidence rather than a question related to its admissibility in the proceedings.⁶⁷⁶ Indeed, it can be argued that the Israeli legal order has moved from the endorsement of *Frye* to an approach which views all issues of expert evidence as matters pertaining to the weight due to be awarded to the furnished evidence rather than to its admissibility in the first place.⁶⁷⁷ The *Daubert* standard parameters of the validity of

⁶⁷⁴ Ibid, para.125 (note the use in the original of the expression 'dea mevuseset'-an opinion that has a basis-namely that is reliable)

⁶⁷⁵ Avraham Saar, *Aim hal shinui bemivhanei areaya shebeinian shebemada?* (Is There a Change in the Evidentiary Standards when it comes to Science?) 30 Refua Umishpat 166 (2004) (in Hebrew)

⁶⁷⁶ Israeli Supreme Court, 1639/01 (Civil), Judgment, 2 June 2004 available at https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\01\390\016\C12&fileName=01016390_C12.txt&type=4

⁶⁷⁷ Gal Rozenszaig, *Itztala Madait eina Mevaseset Kvilit: Diun bakvut Alahat Metzgora veZadorov besheela Yehaso arai shel bet amishpat lereayot amadiot* (A Scientific Robe does not Establish Reliability: A Discussion after the Matzagura and Zadorov judgments on the Approach that Court should have towards Scientific Evidence) 49 Refua uMishpat 42,46-47 (2017) (in Hebrew) available at <https://www.justice.gov.il/Units/StateAttorney/Documents/GalRozenzvaig.pdf>

scientific evidence including its acceptance among the scientific community, the methodology undertaken in the expert report or its margin of error, are not seen as relating to whether this particular report should be discharged or not but whether this should be the case altogether for the suggested scientific field upon which this report is based.

This has been rendered evident in the Court's approach taken in a case where the defendant appealed to the Israeli Supreme Court for his conviction on manslaughter.⁶⁷⁸ One of the main issues that emerged before the Supreme Court appeal was the credibility of an expert's report on the shoeprints that were found in the site of the crime and according to the prosecution belonged to the defendant. The defence attorneys questioned the admissibility of the shoeprints expert report as evidence.⁶⁷⁹

Writing the Court's judgment, Judge Hendel noted that since it had been held by the Court in previous decisions that shoeprints formed a valid scientific field, there could be no doubt that a shoeprint report could be admissible as evidence.⁶⁸⁰ Having stated this, Judge Hendel proceeded to examine the validity of the report provided therein and found several blemishes in its methodology and margin of error. On this account, he proceeded to hold that the particular report should hold 'limited' value as evidence.⁶⁸¹ In order to reach this conclusion, Judge Hendel referred to the lack of statistical data, the disagreement among the experts, the methodology followed and the margin of error.⁶⁸² In other words, all these elements which in the U.S. have been typical components of the Daubert standard in order for the judge to decide upon the admissibility of expert evidence, serve in the Israeli jurisprudence to determine the

⁶⁷⁸ Israeli Supreme Court, 1620/10 (Criminal), Judgment, 3 December 2013 available at https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\10\200\016\z17&fileName=10016200_z17.txt&type=4

⁶⁷⁹ Ibid, para.21

⁶⁸⁰ Ibid, para.22

⁶⁸¹ Ibid

⁶⁸² Ibid

weight of such evidence.⁶⁸³ This is explicitly stated by Judge Hendel that ‘following Daubert, and its endorsement in our legal order, the rules have changed. The time has come to require a minimal threshold before attributing weight to a certain piece of scientific evidence, even if its admissibility has not been rejected in general terms.’⁶⁸⁴

As already noted in chapter 4, such an approach runs the danger of entering pseudo-science as part of the considerations the judge has to take into account in coming to render his judgment⁶⁸⁵ and it is this risk that prompted the endorsement first in *Frye* and then in *Daubert* of certain standards of expert evidence assessment. Moreover, by holding that expert evidence should be assessed on the basis of its weight rather than on admissibility grounds, the Israeli courts end up perusing such evidence. Even if ending up attributing zero or minimal weight to them, it has been argued that the existing stance of the Israeli jurisprudence is highly problematic.⁶⁸⁶ The fact that the judge is exposed to expert evidence which in other jurisdictions might not pass the admissibility threshold due to their dubious scientific validity, raises the stakes that the final judgment will be ultimately influenced by such an exposure.⁶⁸⁷ On this account, the reliability parameter to which the Israeli legal order adheres, can be seen as a safeguard of minimizing any adverse repercussions of the aforementioned stance.

⁶⁸³ For the fact that the Daubert reminding parameters established by Judge Hendel in Mazagura, have been treated by subsequent judgements as parameters against which the weight rather than the admissibility of the expert evidence should be measured see Israeli Supreme Court, Roman Zadorov v. State of Israel, 7939/10 (Criminal), Judgment, 23 December 2015, paras.334-340 available at https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\10\390\079\w53&fileName=10079390_w53.txt&type=4

⁶⁸⁴ Israeli Supreme Court, 1620/10, supra note 679, para.22

⁶⁸⁵ Gal Rozenszaig, supra note 678 at 46

⁶⁸⁶ Ibid at 48

⁶⁸⁷ Ibid

5.5 Conclusion

The current chapter has traced the Daubert standard in common law jurisdictions outside of the U.S. Acknowledging the role the United Kingdom has historically played in political and legal developments in the common law countries, the chapter started its analysis with expert evidence in England and Wales. It then proceeded to encompass large common law countries such as Australia, Canada, and India which are Commonwealth Members, but also included Ireland and Israel, which were once part of the British Empire, but are now not part of the Commonwealth. The comparative analysis found that the examined legal orders do include the requirement for the judge to base his judicial analysis and discussion of matters of expertise on scientifically reliable grounds which can include also views which are not dominant among the scientific community. For this though to happen, the judge has to delve into the methods and conclusions of the experts as the Daubert standard advocates, without this necessarily meaning that foreign jurisdictions like Ireland or Israel have also endorsed the gate-keeping role of the judge that the standard calls for.

It could be argued that the readiness of common law jurisdictions to endorse Daubert and the way the standard entrusts the discussion of what is scientifically reliable to the judge rather to the general conclusions of the scientific community, should be expected due to the common features all common law jurisdictions share, the U.S. one being no exception. On these grounds, the litmus test is whether the Daubert precepts and the requirement for the judge to discuss issues of expertise on scientific grounds that he will term as reliable in relation to the specific facts before him, can be met also in other jurisdictions beyond the common law world. This is something that the next chapter will discuss.

Chapter 6: *The Daubert Standard Beyond the Common Law World*

6.1 Introduction

The previous chapter demonstrated how the Daubert standard can be seen as being relevant in the most representative common law jurisdictions. Yet, in order to be considered to constitute a general principle of law, the standard must also be pertinent in jurisdictions beyond the common law world. These jurisdictions can be clustered in three major categories. The first relates to the jurisdictions in Europe which have traditionally endorsed the inquisitorial system. On these grounds, in addition to Germany, France, and Spain which have historically impacted on other jurisdictions around the globe, jurisdictions all over Europe, from Finland and Sweden in the Scandinavia to Greece and Portugal in the south will be explored in order to see whether the inquisitorial system is also amenable to *Daubert*. The second category relates to jurisdictions which historically have roots in continental law and the inquisitorial system, but have decided at a particular historical phase to adopt the adversarial system in criminal proceedings. Examples of such jurisdictions include a number of Latin American countries and Italy. Finally, the third category includes states which, although never under the colonial rule of any European powers, have come under Western influence in their legal systems and have adopted elements of the inquisitorial system. States in the Far East, for example China and Japan, can be considered as examples of such hybrid legal systems⁶⁸⁸ and will be examined as such in relation to if and how they have come to endorse the Daubert standard principles.

⁶⁸⁸ Percy Luney Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 *Law & Contemp. Problems* 129,143 (1989)

6.2 The Daubert Standard in Inquisitorial Criminal Jurisdictions in Europe

In inquisitorial criminal jurisdictions, the initiative for expert witnesses to come and testify is mainly undertaken by the presiding judge in the trial. To this extent, the introduction of these experts in the trial by the judge is done through an already drafted list that is at the court's disposal and this renders it less possible for the judge to ultimately cast doubts on or reject their testimony.⁶⁸⁹ The presumption that their testimony is going to be trustworthy, relevant, and reliable lessens the need for the judge to apply *Daubert*-related criteria and scrutinize the report's quality and methodology. This does not mean that such criteria are totally absent in continental law jurisdictions, yet they are provided in the beginning of the report's compliment rather than in the end of the process. In other words, the judge instructs the expert to draft a certain opinion or report based on a certain scientific methodology, rather than coming to examine the existence of such a methodology after the document has already been compiled. Along these lines, this section will examine the relevant arrangements in some of the major continental law jurisdictions in more detail.

6.2.1 Germany

In Germany, the Code of Criminal Procedure entrusts the judge with the task of introducing expert testimonies in the trial.⁶⁹⁰ These testimonies are meant to assist him or her with the elucidation of the facts⁶⁹¹ and Section 73 states that 'the judge shall select the experts

⁶⁸⁹ Council of Europe, European Committee on Crime Problems (CDPC), 59th Plenary Session, Strasbourg, 7-10 June 2010, Appendix I, p.101

⁶⁹⁰ Michael Bohlander, *PRINCIPLES OF GERMAN CRIMINAL PROCEDURE*, Hart Publishing (2012) 212

⁶⁹¹ Hinrich Ruping, *Zur Rolle des Sachverständigen im Strafverfahren* at 1 available at http://www.pknds.de/fileadmin/user_upload/Dokumente/Sonstiges/Berichte/Herr_Prof._Dr._Hinrich_Rueping_2.pdf

to be consulted and shall determine their number.’⁶⁹² On this account, the judge can either respond positively to a relevant request posed by the parties to a criminal trial⁶⁹³ or act *proprio motu* and draw from a pool of experts.⁶⁹⁴ The requirement for the expert witness to be drawn from a public registry provides an assurance to the judge that the furnished report will come from an accredited expert in his or her field and thus will be donned with a mantle of reliability.⁶⁹⁵ On these grounds, although Section 73 of the Code of Criminal Procedure does not enclose any details on the particular components such expert evidence is to include, reliability becomes a major parameter. More specifically, when it comes to issues of science, such reliability is ascertained once the judge reaches the conclusion in accordance with the free probative value of evidence in German law that certain scientific methods conform to the ‘general empirical studies of science.’⁶⁹⁶ Often, this is with no recourse to the expert witnesses.

The ‘general empirical studies of science’ (*allgemeine Erfahrungssätze der Wissenschaft*) phraseology may render the impression that German jurisprudence aligns with *Frye*. Nevertheless, such a conclusion would be incorrect. The question of whether a scientific opinion is reliable is not left to become a mere reference to the prevailing opinions among

⁶⁹² German Code of Criminal Procedure StPO, 7 April 1987, Federal Law Gazette Part I, p.1074,1319, Section 73 (translated in English under the auspices of the Federal Ministry of Justice) available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.pdf

⁶⁹³ Hinrich Ruping, *supra* note 692 at 2

⁶⁹⁴ Markus Dubber & Tatjana Hornle, *CRIMINAL LAW: A COMPARATIVE APPROACH*, Oxford University Press (2014) 511 (noting that in German criminal procedure it is the judge’s task to introduce witnesses, experts and other evidence)

⁶⁹⁵ Michael Bohlander, *supra* note 691 at 212. For the fact that the experts must be reliable see also Daniel Krause, Siebenter Abschnitt, Sachverständige und Augenschein, Section 81(f), para.18 in Lowe-Rosenberg, *DIE STRAFPROZESSORDUNG UND DAS GERICHTSVERFASSUNGSGESETZ*, Grosscommentar, De Gruyter Recht, Berlin (2004) 237

⁶⁹⁶ On this see for example BGH, Judgment 11 June 1952-3 StR 229/52, LM No.9 to Section 261 of the Criminal Procedure (concerning the method of fingerprint identification). For the treatment of the fingerprint identification in U.S. jurisprudence see Lyn Haber and Ralph Norman Haber, *Scientific Validation of Fingerprint Evidence under Daubert*, 7 Law, Probability & Risk 87 (2008)

scientists. Rather, it is the task of the judge, each time, to ensure that reference to issues beyond the judicial expertise takes place on reliable grounds.⁶⁹⁷

Along these lines, the German Federal Court reached important conclusions on the matter in a case reaching it on appeal from the District Court of the city of Koblenz (Landsgericht Koblenz).⁶⁹⁸ The case concerned the District Court's conclusion that the defendant, accused of murder, suffered from a severe psychological disorder and thus should be admitted to a psychiatric hospital. The Court based this conclusion by unquestionably adhering to the opinion provided by a court-appointed psychiatrist. Despite the fact that the defendant's lawyers cast doubts on the opinion's epistemological soundness and asked the Court to grant permission for a second psychiatric evaluation to be undertaken by mental health experts endorsed by the defence team, the Court refused the request.⁶⁹⁹ On appeal, the Federal Court overturned the District Court's verdict. The Federal Court emphasized that judges should not accept the findings of experts without investigating beforehand whether such findings were grounded on reliable scientific sources and whether the expert's undertaken methodology corresponded to the techniques and methods established by the relevant literature in the field.⁷⁰⁰ Judges must additionally ensure that an expert's conclusions can be verified and that they are bereft of bias.⁷⁰¹

Whereas the Federal Court did not proceed to instruct judges on how they could measure the reliability parameter,⁷⁰² the reference to the undertaken methodology seems to imply a *Daubert*-like test. This is further underlined in the Criminal Procedure Code. Section 244 holds in subsection 4 that the judge will not refuse the granting of a second expert opinion

⁶⁹⁷ Artur Appazov, *EXPERT EVIDENCE AND INTERNATIONAL CRIMINAL JUSTICE*, Springer (2016) 164

⁶⁹⁸ BGH, Judgment 12 November 2004-Az.2 StR 367/04

⁶⁹⁹ Ibid, para.4; Artur Appazov, *supra* note 698

⁷⁰⁰ Ibid, para.28; Antonio Esposito & Christoph Safferling, Report-Recent Case Law of the Bundesgerichtshof (Federal Court of Justice) in Strafsachen (Criminal Law), 9 German L. J. 683,695,697 (2008)

⁷⁰¹ Antonio Esposito & Christoph Safferling, *ibid*

⁷⁰² Artur Appazov, *supra* note 698 at 165

if the provided first one is based, inter alia, on erroneous factual suppositions, contains contradictions, or the second expert ‘has means of research at his disposal which seem to be superior to the ones of an earlier expert.’⁷⁰³

This reference to the means of research is particularly reminiscent of the methodology element underlined in *Daubert*. As the Federal Court has held, such ‘means of research’ must be seen as encompassing the research tools and procedures only, and not the overall esteem the expert enjoys among his peers.⁷⁰⁴ Along these lines, experts must provide the court not only with the results of their research but also with the followed methodology,⁷⁰⁵ so that their conclusions will denote the undertaking of a holistic approach on the subject.⁷⁰⁶ In that sense, this case to case duty of care entrusted to judges concerning the reliability of a provided opinion or report resembles more the ‘gatekeeper’ function *Daubert* reserves for courts.

6.2.2 France

In France, expert witnesses have been part of the trial on civil matters as far back as the 17th century.⁷⁰⁷ The first lists of experts that were introduced in the criminal trial were drafted in the end of the 19th century.⁷⁰⁸ In 1971, these lists of experts were unified with those for civil matters. This classified experts according to their specialties and drew the arrangements concerning expertise in French civil and criminal law close to each other.⁷⁰⁹ Decree No. 2004-1463, as has been since modified by consequent Decrees, further updated the arrangements

⁷⁰³ German Code of Criminal Procedure StPO, 7 April 1987, Federal Law Gazette Part I, p.1074, 1319, section 244(4) (translated in English under the auspices of the Federal Ministry of Justice) available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.pdf

⁷⁰⁴ BGH, Judgment 21 November 1969, Az 3 StR 249/68, para. 49 (referring to the expert’s ‘Hilfsmittel und Verfahren’ (methods and procedures))

⁷⁰⁵ BGH, Judgment 14 May 1974-3 StR 113/75

⁷⁰⁶ Daniel Krause, Siebenter Abschnitt, Sachverständige und Augenschein: Section 72, para.25 in Lowe-Rosenberg, supra note 696 at 18

⁷⁰⁷ Rapport de la Commission de Reflexion sur l’Expertise, March 2011 at 4

⁷⁰⁸ Ibid

⁷⁰⁹ Academie Nationale de Medecine, Competence Scientifique et technique de l’expert et qualite de l’expertise en Responsabilite Medicale, Rapport-Recommandations-Auditions-Annexes, March 2011-4 October 2011 at 4; Rapport de la Commission de Reflexion sur l’Expertise, supra note 708 at 5

regarding the composition of expert lists and the procedure undertaken for a particular expert to be included in these lists.⁷¹⁰ The fact that the scientific fields from which experts will be called to offer their opinion are ordained by law has been seen as a way for the French legislator to keep ‘junk science’ outside the courtroom, thus mirroring the *Daubert* aspirations. In French law, experts are deemed to be ‘occasional helpers of the judge’ (*collaborateurs occasionnels du juge*’ or ‘*experts de justice*’).⁷¹¹ In that sense, any claims of expert bias are reduced, albeit not completely eliminated. Nevertheless, in that sense, the French criminal procedure addresses these bias claims by first allowing the parties in the trial to modify the questions posed to the expert⁷¹² and secondly by allowing them to contest the expert’s conclusions either orally or in writing.⁷¹³

Yet, while the French Code of Criminal Procedure details the procedure along which the judge is to ask experts to provide their opinions to the court and the possibility for such expert views to be refuted by the parties during the oral procedure,⁷¹⁴ the Code is rather taciturn⁷¹⁵ and does not contain any particular provisions on how the reliability of the provided expert opinions and reports is to be ensured. On this issue, the gap is filled by bodies, such as the so-called ‘Commission on Reflection of Expert Evidence’, convened under the auspices of the French government with the task of proposing reforms in the law of expert testimonies in civil and criminal law. In its report, the Commission underlined the fact that expert reports and

⁷¹⁰ Decree No. 2004-1463 du 23 decembre 2004 relatif aux experts judiciaires available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005983254>

⁷¹¹ Rapport de la Commission de Reflexion sur l’Expertise, supra note 708 at 5; Academie Nationale de Medecine, supra note 710; Marcel Bayle, Livret de culture juridique generale a l’usage de l’expert judiciaire, Centre de Recherches sur l’Entreprise, les Organisations et le Patrimoine, Universite de Limoges, January 2013 at 4 available at <http://www.unilim.fr/creop/files/2012/10/Livret-DU-EXPERTISE-JUDICIAIRE-7-janvier-2013.pdf>

⁷¹² On this, see article 161-I of the French Code of Criminal Procedure

⁷¹³ See art.168 of French Code of Criminal Procedure; Rapport de la Commission de Reflexion sur l’Expertise, March 2011, p.8. For such an example of a contestation in written see Emmanuel Marsigny Avocats, Observations et Demande de Complements d’Expertise, Paris, 19 January 2015 available at <http://medias.sncf.com/sncfcom/open-data/rapport-securite/BRETIGNY-observations-et-demande-de-complement-d%27expertise.pdf>

⁷¹⁴ On this see arts.156-169 of the French Code of Criminal Procedure

⁷¹⁵ On this, see article 166 of the French Code of Criminal Procedure

opinions must be written in clear language that can be understood by the judge and the relevant parties.⁷¹⁶ Furthermore, in criminal matters, the judge must be ready, if necessary, to provide experts with certain questions that must be answered or with certain forms that he or she will be called on to fill out.⁷¹⁷ These forms examine, inter alia, whether the conclusions reached by the expert are relevant, precise, and clear.⁷¹⁸ In turn, expert opinions and reports that hold these characteristics of relevance, precision, and clarity also hold more chance of being equally reliable.

In that sense, the Commission Report places the reliability parameter in the centre of the expert report's discussion. This is the case despite the facts that its recommendations do not stress this reliability parameter as a precondition of an expert reports' credibility nor do they contain any references to the Daubert standard itself. Yet, the emphasis these recommendations put on the fact that the judge is due to provide the experts with forms to be filled out can be seen as an attempt to ensure that the judge will receive a methodologically sound report, pursuant to the stipulations of the Daubert standard.

Similar recommendations have also been put forth by the French High Court (*Cour de Cassation*).⁷¹⁹ In these recommendations, the Court explicitly addresses the question of whether the judge, in coming to ordain an expert with a certain mission of compiling a report on a matter, should also specify the methodology that the expert must apply.⁷²⁰ It is noteworthy

⁷¹⁶ Rapport de la Commission de Reflexion sur l'Expertise, supra note 708 at 33

⁷¹⁷ Ibid at 28

⁷¹⁸ Ibid, annex 4 at 56

⁷¹⁹ Cour de Cassation, Recommandations de bonnes pratiques juridictionnelles, 15-16 novembre 2007 available at https://www.courdecassation.fr/venements_23/colloques_4/2007_2254/recommandations_bonnes_pratiques_juridictionnelles_11103.html#IIIq3x1

⁷²⁰ Cour de Cassation, Recommandations de bonnes pratiques juridictionnelles, 15-16 novembre 2007: Sur la Definition de la Mission d'Expertise, Question 3 available at https://www.courdecassation.fr/venements_23/colloques_4/2007_2254/recommandations_bonnes_pratiques_juridictionnelles_11103.html#IIIq3x1. The importance of the methodology followed by the expert also for the general quality of the dialogue between the expert and the judge, has been noted also by a commission of experts convened to study resort to the psychiatric expertise in the realm of the criminal trial. On this, see

that the *Cour de Cassation* recommendations refer to civil law matters. Nevertheless, the *Cour de Cassation* serves as the highest judicial authority both in civil and criminal matters and analysis of expertise in civil and criminal law has been combined in other public documents concerning expertise testimonies. One could, therefore, argue that the *Cour de Cassation* recommendations could be seen as applying *mutatis mutandis* also to criminal law matters,⁷²¹ especially given that the *Cour de Cassation* has not issued separate recommendations for expertise issues in criminal law.

6.2.3 The Netherlands

Traditionally, the Dutch Code of Criminal Procedure was silent when it came to the introduction of standards for expert witnesses.⁷²² Such standards on expert witnesses in criminal trials were introduced in 2009⁷²³ and, to a large extent, resembled those in the German legal system. There is a public registry of experts from which the judge draws each time an expert is needed to testify on a matter.⁷²⁴ Moreover, particularly for issues pertaining to forensics, the Netherlands Forensic Institute exists as a governmental organization meant, according to its statute, to provide high-quality forensic services to state authorities, such as the prosecution in a criminal trial or the police. The existence of such an institute echoes that

Expertise Psychiatrique Penale, Rapport de la Commission d'audition, Ministere de la Sante et des Solidarites, 25&26 janvier 2007 at 67

⁷²¹ For the similarities and differences between the civil and criminal jurisdictions in the realm of the French legal order see Marcel Bayle, *Livret de culture juridique generale a l'usage de l'expert judiciaire*, Centre de Recherches sur l'Entreprise, les Organisations et le Patrimoine, Universite de Limoges, January 2013, p.p.78-80 available at <http://www.unilim.fr/creop/files/2012/10/Livret-DU-EXPERTISE-JUDICIAIRE-7-janvier-2013.pdf>

⁷²² Marc Groenhuijsen, Some Main Findings of 'Strafvordering 2001' and the Subsequent Reform of Dutch Criminal Procedure in THE REFORM OF THE DUTCH CODE OF CRIMINAL PROCEDURE IN COMPARATIVE PERSPECTIVE, Marc Groenhuijsen & Tijs Kooijmans eds, Martinus Nijhoff Publishers (2012) 72

⁷²³ Ministry of Justice. Wet deskundige in strafzaken. August 6, 2009. *Staatsblad* 2009, 351

⁷²⁴ Dutch Code of Criminal Procedure, section 51k available at http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf

of the National Institute of Standards and Technology in the U.S. that attempts to ensure the reliability of forensic science in the aftermath of the *Daubert* ruling.⁷²⁵

In comparison to the relevant arrangements in German law, the Dutch criminal procedure contains a much more explicit reference to the need for expert testimony to also be reliable. Section 511 of the Dutch Criminal Procedure Code stipulates that ‘the expert witness shall submit a reasoned report to the party who instructed him. In this report he shall indicate, where possible, which method he has applied, to what extent this method and the results thereof can be considered reliable and his ability in the application of the method.’⁷²⁶

This need for expert opinions to be based on relevant and reliable foundations has also been mirrored in Dutch jurisprudence.⁷²⁷ In the ‘Anatomically Correct Dolls’ case, the defendant was convicted of sexual offences against children based on expert testimony provided through use of so-called ‘anatomically correct dolls’ that were used for sex education practices.⁷²⁸ The defendant appealed the verdict on the grounds that the expert opinion grounded on the use of these dolls could not be deemed to be reliable. While the Appeal Court quashed the appeal, the Supreme Court accepted it finding the case to be an opportunity to pronounce its general doctrine on the necessity for expert opinions to be reliable. Once such reliability is put under question by the defendant, a court must offer particular reasons why it feels compelled to rely upon the particular opinion.⁷²⁹

⁷²⁵ On this, see the stance of the Principal Deputy of the National Institute of Standards and Technology at Willie May, NIST’s Role in Forensic Science: past, current, future, VCAT, June 11-12, 2013 available at <https://www.nist.gov/sites/default/files/documents/director/vcat/Willie-Forensics-Overview.pdf>

⁷²⁶ Dutch Code of Criminal Procedure, section 511 available at http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf

⁷²⁷ Daniel Krauss et al., The Admissibility of Expert Testimony in the United States, the Commonwealth and elsewhere in *PSYCHOLOGICAL EXPERTISE IN COURT: PSYCHOLOGY IN THE COURTROOM*, Vol. II, Daniel Krauss & Joel Lieberman eds., Routledge (2016) 20

⁷²⁸ Guido Acquaviva et al., *Trial Process*, supra note 366 at 924

⁷²⁹ Ibid

This emphasis on the reliability parameter is further noted in the Supreme Court's judgment in the 'Shoemaker' case.⁷³⁰ In this judgment, the Court, requiring that the providing expert testimony be reliable, questioned the competency of a shoemaker to act as an expert witness and provide reliable information regarding shoeprints.⁷³¹ The Court held that, although the shoemaker had experience in fitting approximately 400 orthopedic shoes per year, he did not have a similar experience analysing shoe traces and it was unclear which method he had used in doing so and why he considered this method to be reliable.⁷³²

In that sense, although the Supreme Court did not formally endorse the Daubert standard, the emphasis these Supreme Court cases placed on the reasoning and the methodology of the provided expert opinion, rendered, in some instances, the impression to courts of lower instance that they should examine the validity of any provided expert evidence along the requirements of *Daubert*. For example, in a judgment dating from 2008, the Utrecht Penal Court of First Instance explicitly mentioned *Daubert* in coming to examine whether the provided expert testimony adhered to the standard.⁷³³ Finding this was not the case, the Court proceeded to assess such evidence according to its free probative discretion.⁷³⁴

6.2.4 Greece

Greece is part of those countries that follow, in their criminal procedure, the continental law legal tradition. Thus, when it comes to the role of experts in the criminal trial, the Greek Code of Criminal Procedure holds that these experts are to be appointed by the judge from a

⁷³⁰ HR 21 January 1998 NJ 1998 404 m nt JR cited in P.J. van Koppen, *Paradoxen van deskundigen: Over de Rol van Experts in Strafzaken*, Kluwer (2004) 8

⁷³¹ P.J. van Koppen, *Paradoxen van deskundigen*, ibid

⁷³² Petra van Kampen, *Expert Evidence: The State of law in the Netherlands and the United States in ADVERSARIAL VS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS*, Peter van Koppen & Steven Penrod eds., Springer (2012) 65

⁷³³ Utrecht District Court (Rechtbank), Penal Sector, Judgment, May 21, 2008, para.3 available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBUTR:2008:BD8767>

⁷³⁴ Ibid

list that is kept by the court.⁷³⁵ The Code gives details on how the experts are to be appointed as well as on their rights and duties.⁷³⁶ It states, *inter alia*, that the experts are to compile a written report which must be submitted to the court and must justify its conclusions, including those of any minority opinions.⁷³⁷ The text of the article does not describe, however, how the judge is to assess the provided report nor does it contain any explicit reference to the fact that the handed report must include information about the pursued methodology. In that sense, and faithful to its Germanic law heritage, the Greek Code does not endorse the Daubert standard. This does not mean, though, that the standard's precepts and the need for the judge to be able to assess the reliability of any scientific or technical findings, in particular, are foreign to the Greek criminal system. Most notably they are found in the legislation concerning narcotics and the way the criminal judge is called to assess the psychiatric reports provided for individuals claiming to be drug addicts.

The Greek penal law envisions much more lenient prison terms if someone is found in possession of drugs if he or she is a drug addict rather than a drug dealer.⁷³⁸ The defendant's drug addiction then becomes a cardinal issue. In coming to pronounce a stance on it, the judge largely relies on the expert's report which is *ad hoc* compiled. Along these lines, Act 3459/2006 stipulates, in Section 30 subsection 3, that experts must decide whether or not a defendant is a drug addict and must determine the following: whether the addiction is physical or mental and

⁷³⁵ Greek Code of Criminal Procedure, January 1951, arts.183,185-186 available at <http://www.ministryofjustice.gr/site/kodikis/%CE%95%CF%85%CF%81%CE%B5%CF%84%CE%AE%CF%81%CE%B9%CE%BF/%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%91%CE%A3%CE%A0%CE%9F%CE%99%CE%9D%CE%99%CE%9A%CE%97%CE%A3%CE%94%CE%99%CE%9A%CE%9F%CE%9D%CE%9F%CE%9C%CE%99%CE%91%CE%A3/tabid/345/language/el-GR/Default.aspx> (in Greek)

⁷³⁶ Greek Code of Criminal Procedure, arts. 189-202

⁷³⁷ Greek Code of Criminal Procedure, art. 198

⁷³⁸ Kostas Kosmatos & Gerasimos Papanastasiotou, *Exartisi kai piniki dikeosini: I axiologisi tis ekthesis pragmatognomosinis sxetika me tin exartisi tou katigorumenou stin piniki diki* (in Greek) (Addiction and criminal justice: The assessment of the expert's report concerning the defendant's addiction in the realm of the criminal trial), *Piniki Dikeosini* 1/2011 available at http://kosmatos-lampakis.gr/sites/default/files/32_%CE%91%CE%A1%CE%98%CE%A1%CE%9F_%CE%95%CE%A1%CE%95%CE%A5%CE%9D%CE%91%20%CE%9D%CE%91%CE%A1%CE%9A%CE%A9%CE%A4%CE%99%CE%9A%CE%91_%CE%9A%CE%95%CE%98%CE%95%CE%91.pdf

if this is possible also its degree; the specific drug and its dose that is mostly used by the defendant and the suitable therapy that is recommended in order for the addict to recover from his addiction.⁷³⁹ In that sense, the law in this particular case requires the judge to be able both to assess whether the defendant is or is not a drug addict through reliance on the expert's report and review the elements contained in it.

When it comes to the assessment of psychiatric or psychological reports, Greek scholars have argued that, although under the Greek criminal procedure the judge is free to evaluate the evidence as he or she sees fit and thus reject the conclusions reached in these reports, the judge, in doing so, must provide explicit reasons for not accepting the provided reports.⁷⁴⁰ These reasons may relate to the real facts of the case, the applied scientific rules and principles, or the way the facts of the case have been subjugated to these rules.⁷⁴¹ Along these lines, it becomes clear that, in order to do so, the judge must open a dialogue with the expert who provided the report regarding the Daubert standard precepts of reliability and pursued methodology. Moreover, Greek scholars have underlined the fact that expert reports can have an evidentiary value only once they present scientifically reliable conclusions extracted through the application of scientific rules and principles.⁷⁴²

6.2.5 Spain

Spain belongs to those countries that adopt the inquisitorial system in their criminal proceedings.⁷⁴³ According to the Spanish Criminal Procedure (Ley de Enjuiciamiento

⁷³⁹ Ibid at 87

⁷⁴⁰ Akrivi Giovanuda, *I Psichaitriki-Psihologiki Pragmatognomosini stin Piniki Diki* (in Greek) (The Psychological-Psychiatric Experts' Report in the Criminal Trial), LLM Thesis, Aristotle University of Thessaloniki, 2015 at 45-46 (with reference to the relevant bibliography)

⁷⁴¹ Ibid

⁷⁴² Ibid

⁷⁴³ M. Robledo, *La Aportacion de la Prueba Pericial Cientifica en el Proceso Penal*, *Gac. Int'l. Cienc. Forense*, No.15, April-June 2015 at 8 available at https://www.uv.es/gicf/2TA1_Robledo_GICF_15.pdf; Juan Manuel Alcoceba Gil, *Los Estandares de Cientificidad como criterio de admisibilidad de la prueba cientifica*, 4 *Revista Brasileira de Direito Processual Penal* 215, 225 (2018)

Criminal), expert witnesses are appointed by the judge and must compile reports that include, inter alia, conclusions reached according to the scientific rules and principles.⁷⁴⁴ Similarly, Article 788.2 of the same document also states that the reports of laboratories will constitute expert evidence to the extent that they follow the scientific protocol.

This reference to the scientific principles brings the particular provision closer to the *Daubert* reliability precept.⁷⁴⁵ On this account, in the realm of the provision in Article 788.2, the Spanish Supreme Court has held that the defendant can bring experts of his or her own to contest the relevant laboratory reports, but still this must be done in a way that the judge is able to review the need for such experts to counter-argue the conclusions of these reports.⁷⁴⁶ In other words, the judge must always be able to understand the scientific debate in order to be able to rule on the necessity of the provided expert testimony from the defendant's point of view. As well, such a judicial evaluation must be in tandem with the judge's 'gatekeeping' role established by *Daubert*. This is further depicted in Article 588 of the proposed amendment to the Law of Criminal Prosecution (Anteproyecto de Ley de Enjuiciamiento Criminal) according to which reasons should be given for any contestation of the experts' conclusions, although it was eventually abandoned due to the proclamation of general elections.

This rapprochement between the Spanish criminal procedure and *Daubert* becomes more evident when looking at the jurisprudence of the Spanish courts on the issue of expert evidence in criminal proceedings. The country's Supreme Court has not explicitly cited

⁷⁴⁴ Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, art.478 available at <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036>

⁷⁴⁵ Juan Manuel Alcoceba Gil, Ciencia y Proceso: La Prueba del ADN en el Proceso Penal Español, Doctoral Thesis, December 2015 at 183 available at https://e-archivo.uc3m.es/bitstream/handle/10016/22353/tesis_doctoral_alcoceba_gil_2015.pdf

⁷⁴⁶ Supreme Court of Spain, Sentencia No. 97/2004 de TS, Sala 2a de lo Penal, 27 de Enero de 2004 (Judgement 97/2004, 2nd chamber, penal jurisdiction, 27 January 2004) available at <https://supremo.vlex.es/vid/salud-da-presuncion-inocencia-legalidad-s-16718062>

Daubert on criminal law matters.⁷⁴⁷ Yet, in the realm of the civil procedure it has held that experts' must explain, in their reports, how they reached their conclusions and which methodological tools they used.⁷⁴⁸ Similarly to the methodology quest requirement, Spanish courts also demand that experts explicitly state their reasoning in order for the judge to be able to hold whether he should admit the provided report as evidence or reject it.⁷⁴⁹ In that sense, the non-discussion of *Daubert* in criminal matters so far, seen in conjunction with the cited provisions of the Law of Criminal Prosecution, should not be interpreted as an aversion of the Spanish courts towards the requirements of the standard and the need for judges to also base their pronouncements on firm scientific principles in criminal proceedings.

This was reaffirmed in the Draft Code of Criminal Procedure (Proyecto de Código Procesal Penal) which was drafted in 2013 in order to replace the Law of Criminal Prosecution which was deemed, due to certain parts, to not offer satisfactory solutions to the challenges criminal justice faces.⁷⁵⁰ Ultimately, due to political reasons, the Draft Code was not adopted⁷⁵¹ but it is interesting to note that when it came to the assessment of expert evidence, it incorporated the *Daubert* standard paradigm.

⁷⁴⁷ M. Robledo, La Aportación de la Prueba Pericial Científica en el Proceso Penal, Gac. Int'l. Cienc. Forense, No.15, April-June 2015 at 8 available at https://www.uv.es/gicf/2TA1_Robledo_GICF_15.pdf

⁷⁴⁸ On this, see Maria Pilar Mollar Piquer, La Prueba en el Proceso de Consumidores y Usuarios Español, Castellón de la Plana, March 2017 at 132, n.290 available at https://www.tdx.cat/bitstream/handle/10803/404729/2017_Tesis_Mollar%20Piquer_MPilar.pdf?sequence=1&isAllowed=y; Miguel Angel Soria Verde and Susana Simo, Regulación Jurídica y Ámbitos Aplicados de la Criminología Forense: Del Modelo Anglosajón al Español, Revista Electrónica de Ciencia Penal y Criminología (2015) at 13

⁷⁴⁹ See Maria Pilar Mollar Piquer, *ibid* at 132, n.289-290 (citing decisions of the courts of Murcia and Barcelona)

⁷⁵⁰ Código Procesal Penal available at http://estaticos.elmundo.es/documentos/2013/06/04/codigo_procesal_penal.pdf. For the fact that the Law of Criminal Prosecution was deemed inadequate to address modern challenges in criminal procedure and the extensive revision of a number of its provisions by the Organic Law 13/2015 see the introduction of Ley Orgánica 13/2015 de 5 de octubre de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-10725

⁷⁵¹ Fernando Garea, El Gobierno deja en el cajón una de las Reformas Estrella de Gallardón, El País, 19 April 2014 available at https://elpais.com/politica/2014/04/19/actualidad/1397917362_209439.html

Along these lines, the concept of reliability, as one of the precepts that should govern expert testimonies,⁷⁵² is found in Article 400 in the Draft Code, which is similar to Article 478 of the Law of Criminal Prosecution. The Draft Code held that the expert's report should also contain, among other things, the conclusions which should conform to the principles, rules, and techniques of the expert's scientific, artistic, technical, or practical field.⁷⁵³ The words 'techniques' 'technical' and 'practical' which were added to the Draft Code seem to depict a *Daubert* trilogy influence. It is also noteworthy that scientific and technical knowledge appear together in section 702 of the U.S. Federal Rules of Evidence. The *Daubert* influence is even starker in article 401 of the Draft Code which states that the experts can be called to testify orally before the court, inter alia, on the methodology they used in order to reach their conclusions. This particular provision is to be contrasted with article 483 of the Law of Criminal Prosecution, however, which states that the judge can pose questions to the experts and ask for clarifications, but does not make any explicit reference to methodological issues.

The role that the *Daubert* standard imparts on expert reports in the Spanish Criminal Procedure becomes more acute when it comes to the appraisal of psychological matters. Along these lines and depicting a clear *Daubert* influence, the Psychologists' Deontological Code holds, in Article 48, that the psychological reports have to be clear, precise, rigorous, and intelligible. They have to define the scope of their conclusions, limitations, degree of certainty, and the techniques they employed to reach certain conclusions.⁷⁵⁴

⁷⁵² Código Procesal Penal at 15 available at http://estaticos.elmundo.es/documentos/2013/06/04/codigo_procesal_penal.pdf

⁷⁵³ Ibid, section 400

⁷⁵⁴ Colegio Oficial de Psicólogos de Madrid, Código Deontológico del Psicólogo, endorsed on 27 April 2004 (lastly modified on 29 April 2010), art.48 available at <http://www.copmadrid.org/webcopm/recursos/codigodeontologicojunio2010.pdf>

6.3 The Daubert Standard Beyond the Common Law/Continental Law Divisions: Europe, the Far East, and Latin America

As noted in chapter 4, the distinction between the adversarial and the inquisitorial systems largely follows the division between common and continental law. Yet, there have been cases of countries that came from a continental law background but ultimately decided to adopt the adversarial system in their criminal procedures. Examples of such countries can be found all over the globe with the exception of Africa. Africa as a continent is a sui generis category due to the fact that, so far, there has been no known case of a state that came from the continental law heritage but imbedded common law elements in its criminal proceedings. This is true both for countries that are former German or French colonies as well as states, such as Cameroon,⁷⁵⁵ South Sudan⁷⁵⁶ or Rwanda⁷⁵⁷ that could have undertaken a common law

⁷⁵⁵ For this history and how part of Cameroon was under British trusteeship before the country gained independence, see Andrew Ewangsone, *Criminal Procedure in Cameroon: From Dualism to a Common Code* in READINGS IN THE CAMEROON CRIMINAL PROCEDURE CODE (Andrew Ewangsone ed., Presses Universitaires d'Afrique, 2007) 15-16. As the State of Cameroon notes in its response to the UN Human Rights Committee on account of its 4th periodic report 'Cameroon is a bijural country with the common law and civil law systems being applicable.' On this see ICCR, Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, CCPR/C/CMR/4, 11 May 2009, para.47. On this account, see also the Cameroon Criminal Procedure Code which, when it comes to expert opinions, seems to follow the French model containing no provisions on how these opinions are to be assessed by the judge. On this see Criminal Procedure Code, Law No. 2005 of 27 July 2005, sections 203-217 available at <http://www.icla.up.ac.za/images/un/use-of-force/africa/Cameroon/Criminal%20Procedure%20Code%20Cameroon%202005.pdf>. The fact that French law elements are entrenched in Cameroon's legal system is further demonstrated by the fact that the French model of law reform commissions was adopted for the drafting of a criminal procedure code. On this see Andrew Ewangsone, *Criminal Procedure in Cameroon: From Dualism to a Common Code* in READINGS IN THE CAMEROON CRIMINAL PROCEDURE CODE (Andrew Ewangsone ed., Presses Universitaires d'Afrique, 2007) 21

⁷⁵⁶ After its independence from Sudan in 2011, South Sudan adopted common law. On this see Kuang Harriet Logo Mulukwat, *The Formative Stages of Common Law in South Sudan: The Ensuing Consequences for the Judiciary*, June 3 2014 at 6 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445313&download=yes. Yet, its criminal procedure code does not contain any provisions on how the judge is to assess the experts' reports. On this see South Sudan Code of Criminal Procedure Act 2008, section 213 just stipulating that 'Any document purporting to be a report under the hand of any expert in bacteriology, physiology, biology, pathology, chemistry or other branch of scientific knowledge in the civil service of Southern Sudan or other parts of the Sudan, regarding any matter or thing duly submitted by him or her for examination or analysis in the course of any proceedings under this Act, may be used as evidence in any trial or other proceeding under this Act.' (Code of Criminal Procedure Act 2008 published at the Southern Sudan Gazette No.1 Volume 1, 10 February 2009 available at <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3D&tabid=342>)

⁷⁵⁷ After the 1994, Rwanda made a turn to common law, yet its code of criminal procedure code does not reflect this, the relevant provision on the assessment of expert opinions stipulating that the judge will ask for the reasons behind the experts' opinions only in case two or more opinions are conflicting. On this see Law

approach in their criminal proceedings due to their unique colonization and political historical background and the role common law came to play as a result.

Along these lines, the case of Namibia must be cited. Namibia is a country which has gone through a German continental law colonization period, but spent a considerable period of time under South African rule beforehand. For historical reasons, the South African legal order entails continental law elements due to the Dutch rule,⁷⁵⁸ hence Namibia and a number of other countries in the region, for example Zimbabwe, Lesotho, Swaziland, and Botswana, are considered have a hybrid legal system.⁷⁵⁹ Nevertheless, as is the case with Botswana since its independence,⁷⁶⁰ Namibia has also showed a particular orientation towards common law, at least when it comes to criminal matters.⁷⁶¹ As a country most recently acquiring its independence in this region, the Namibian example can serve as a paradigm for the other countries in the region that also have a hybrid.

The criminal proceedings in Namibia follow the adversarial system. This is manifested, among other things, by the fact that according to the Namibian *Criminal Procedure Act 2004*, it is the parties that call in expert witnesses.⁷⁶² However, this Act does not contain any

No.30/2013 of 24/5/2013 Relating to the Code of Criminal Procedure, Official Gazette, No.27 of 08/07/2013, article 83. For the adoption of common law by Rwanda after the genocide see Kuang Harriet Logo Mulukwat, The Formative Stages of Common Law in South Sudan: The Ensuing Consequences for the Judiciary, June 3 2014 at 14-15 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445313&download=yes

⁷⁵⁸ Francois du Toit, Roman-Dutch Law in Modern South-African Succession Law, *Ars Aequi* 278-79 (2014) available at <https://pdfs.semanticscholar.org/147c/1f66472afa468f63515c55ecc0bcfa3d0e8b.pdf>

⁷⁵⁹ Dunia Zongwe, Equality has no Mother but Sisters: The Preference for Comparative Law over International Law in the Equality Jurisprudence in Namibia in *INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA* (Magnus Killander ed., 2010, Pretoria University Law Press) 137

⁷⁶⁰ Charles Manga Fombad, Botswana and the Dynamics of Legal Modernization within a Dual English Common Law/Roman Dutch Law Legal Heritage, 13 *African J. Int'l. & Comp. L.* 7 (2005)

⁷⁶¹ Sam Amoo & Isabella Skeffers, The Rule of Law in Namibia in *HUMAN RIGHTS AND THE RULE OF LAW IN NAMIBIA*, (Nico Horn & Anton Bosl eds., 2008) 17,32. In this realm, it is interesting to note that this adherence to common law has not always been to English common law but to common law as developed by the courts of South Africa. For the fact that this has been the case with courts in Botswana, see Gardiol J. van Niekerk, The Application of South African Law in the Courts of Botswana, 37 *The Comparative & Int'l. L. J. Southern Africa* 312,318 (2004)

⁷⁶² Namibia, *Criminal Procedure Act, 2004* (Act. No.25 of 2004), section 173 available at <https://wipolex.wipo.int/en/text/223230>. For the fact that generally proceedings in Namibian courts can have also continental law elements when it comes to the law of evidence, see the Rules of the High Court drafted in 2014 where it is stated that the court can appoint an expert, similarly to what is the norm in continental law

arrangements on how judges are expected to assess the furnished expert opinions and reports. Section 173 holds that the accused can call an expert witness, rendering it clear that the proceedings are waged under the adversarial system and further stipulating that the evidence provided by the expert can be rebutted, but does not elaborate further on the grounds that this can be done on. However, when it comes to psychiatric opinions that must be provided to the court on whether an accused is fit to stand trial or not, section 86(3) goes into more detail regarding the reports that are required. According to this provision, such reports must contain, *inter alia*, ‘the purport of evidence that has been given that is relevant to the accused’s mental conditions or mental capacity.’ In other words, there must be a display of the relevant evidence before the judge that leads to a sanity or insanity statement so that the judge is put into a position of ultimately being able to review the particular piece of evidence. The message that is being imparted is that if this evidence is not scientifically reliable, then the provided psychiatric report will not be able to stand the scrutiny of judicial review.

This same message on the need for scientifically reliable expert reports is conveyed more starkly in the Rules of the High Court of Namibia, being put into force by the Judge-President of the Namibian High Court with the approval of the Republic’s President.⁷⁶³ Already from the first set of Rules enacted in 1990, the year the country became independent, the High Court stressed that expert witnesses were not be called unless it was accompanied by a summary of the expert’s opinion and the reasons for it.⁷⁶⁴ Similarly, in the 2014 version, the

countries. On this see Rules of the High Court of Namibia, Government Gazette of the Republic of Namibia, 14 January 2014, Section 30 available at <http://www.lac.org.na/laws/2014/5392.pdf>

⁷⁶³ For the position of the High Court in the Namibian legal judicial legal system both as a court of first instance as well as a court of appeal on civil and criminal matters see Geraldine Mwanza Geraldo & Isabella Skeffers, *Researching Namibian Law and the Namibian Legal System*, GlobalLex, December 2007 available at <http://www.nyulawglobal.org/globalex/Namibia.html>

⁷⁶⁴ Rules of the High Court of Namibia, Government Gazette of the Republic of Namibia, 10 October 1990 at 99-100 available at <http://www.lac.org.na/laws/1990/90.pdf>

Rules became more eloquent regarding expert opinions and their reports.⁷⁶⁵ Not only does section 29 of the 2014 Rules repeat that the expert must cite the reasons behind his or her opinion, as stated in the 1990 Rules, it also goes one step further. Section 31 states that if the expert thinks that an experiment is necessary in order for him to shape his view, he must notify the trial parties accordingly and invite them to attend the experiment. Whereas the Rules do not provide any explicit justification for such a procedure, the reference to experiments as part of an expert's view is highly reminiscent of the prominent role science plays under *Daubert*. The need for the parties to be present while the experiment takes place serves the *Daubert* requirement for the underlying methodology to be clear so that, ultimately, it can be put under judicial review.

This ideological approach of the *Daubert* standard precepts regarding expert evidence that can also be recognized in the Namibian legal system is equally met in a number of other jurisdictions around the globe that consciously move from the inquisitorial to the adversarial system. Thus, the *Daubert* standard will be examined beyond the continental law/common law divisions in three continents in the subsections that follow. The first subsection will examine Europe which includes states that have traditionally belonged to the continent's western bloc and those that used to belong to the communist bloc, for example Italy and Poland. Outside Europe, those countries in the Far East which were never under European colonization, such as China, Japan, and South Korea will be examined in the second subsection. Finally, the third subsection will examine the move from the inquisitorial to the adversarial system in Latin America where a considerable number of countries have made the relevant switch.

⁷⁶⁵ Rules of the High Court of Namibia, Government Gazette of the Republic of Namibia, 14 January 2014 available at <http://www.lac.org.na/laws/2014/5392.pdf>

6.3.1 The Daubert Standard and the Transition from the Inquisitorial to the Adversarial System: Italy and Poland as Case Studies in the European Continent

Italy and Poland are good examples of European states that recently chose to switch from the inquisitorial to the adversarial system for their criminal procedure. For years, both countries partook of the continental law tradition, adopting the inquisitorial system for criminal proceedings. In Italy, from the moment the various states in the Italian peninsula formed a single state in 1861 till 1988, the influence of the French Napoleonic Code was evident in the Code of Criminal Procedure.⁷⁶⁶ Whereas certain amendments, particularly in the 1970s, brought adversarial elements, such as the concept of orality during proceedings into the Italian criminal procedure, still, the inquisitorial system remained the basis for any criminal procedural arrangements.⁷⁶⁷

In 1988, a new Code of Criminal Procedure was introduced which, inspired by the Anglo-American adversarial system,⁷⁶⁸ came into effect in 1989.⁷⁶⁹ The new Code inserted features such as the adversarial presentation of evidence, cross-examination at trial, and the limited ability of judges to introduce evidence.⁷⁷⁰ These new features, particularly the limitation of the judges' roles, were highly criticized, first and foremost by judges themselves and were seen as running contrary to Italy's cultural values in criminal procedure which,

⁷⁶⁶ Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy* (Italian Procedure Code of 1988), 4 Wash. U. Global Studies L. Rev. 567 (2005); Lawrence Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 Columbia J. Transn'tl L. 245,248 n.18 (1991)

⁷⁶⁷ Giulio Illuminati, *ibid*; Changsheng Li, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, 1(4) J. Politics & L. 13 (2008)

⁷⁶⁸ Ricardo Montana, *Procedural Tradition in the Italian Criminal Justice System: The Semi-Adversarial Reform in 1989 and the Inquisitorial Cultural Resistance to Adversarial Principles*, 20(4) Int'l. J. Evidence & Proof 289,290 (2016)

⁷⁶⁹ Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48(2) American J. Comparative L. 227,228 (2000); William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 Yale J. Int'l. L. 1 (1992); Lawrence Fassler, *supra* note 767 at 251

⁷⁷⁰ Giulio Illuminati, *supra* note 767 at 571

pursuant to the ethos of the inquisitorial system,⁷⁷¹ saw an augmented role for judges and prosecutors.⁷⁷² Along these lines, disbelief in the new system was portrayed through judicial rulings which expansively interpreted the judges' powers to introduce evidence despite the new Code's narrow discretion.⁷⁷³ The enacted 1988 Code did not fully adopt the adversarial system but rather kept some inquisitorial elements.⁷⁷⁴ This was further highlighted when, following a series of Constitutional Court judgments, Parliament passed a law in 1992 that added more inquisitorial features, such as allowing parties to introduce evidence that had emerged in the course of other proceedings.⁷⁷⁵

This, though, was not the end to the Italian criminal procedure saga, as in 1997, the Italian Parliament reintroduced the adversarial system in its criminal proceedings. Yet, the Constitutional Court found such an initiative to be unconstitutional.⁷⁷⁶ As a result, the Constitution was amended accordingly in order to portray the lawmaker's relevant volition on the matter. Article 111 of the Italian Constitution explicitly states, in its current form, that 'the criminal process is governed by the adversarial principle for the determination of evidence.' In 2001, the new Italian Code of Procedure was enacted, returning back the adversarial system.⁷⁷⁷

When it comes to expert evidence, the 2001 Italian Criminal Procedure Code includes provisions for the appointment of experts,⁷⁷⁸ but it contains no further details on how the provided expert opinions are to be assessed by the judge. Due to this, the Italian Supreme Court on civil and criminal matters (Corte Suprema di Cassazione) has come to explicitly make

⁷⁷¹ For the fact that such an ethos provides a hostile climate for adversarial reforms see William Pizzi & Luca Marafioti, *supra* note 770 at 3

⁷⁷² Ricardo Montana, *supra* note 769 at 302-303

⁷⁷³ Giulio Illuminati, *supra* note 767 at 571

⁷⁷⁴ Elisabetta Grande, *supra* note 770 at 232

⁷⁷⁵ Giulio Illuminati, *supra* note 767 at 571; Elisabetta Grande *ibid* at 232

⁷⁷⁶ Giulio Illuminati, *supra* note 767 at 576

⁷⁷⁷ *Ibid* at 581

⁷⁷⁸ Codice di Procedura Penale, arts.220-232 available at <https://www.brocardi.it/codice-di-procedura-penale/libro-quinto/titolo-ii/art333.html>

reference to the Daubert standard in a series of judgments relating to such an assessment, holding that the judge is expected to assert whether the expert's proposed conclusions find a general acceptance amidst the scientific community. According to the Court, to do this, the judge must examine whether the undertaken research was broad, rigorous, and objective as well as the reception of the specific research by the academic community.⁷⁷⁹ At the same time, in the established approach undertaken by the Italian Corte di Cassazione, novel scientific theories can play a probative role. As the Court notes, it is enough that a scientific precept is generally acceptable given 'the widespread awareness of the relativity of the scientific knowledge.'⁷⁸⁰

The Court's approach to scientific opinions is clearly perceived in the Municipality of Boca di Cardore case.⁷⁸¹ The case referred to the petition the Municipality of Boca di Cardore filed before the Corte di Cassazione arguing that it had been wrongly held accountable for the collapse of a building that resulted in the deaths of many people. In coming to examine the causality of the issue, the Court noted that the event was as a result of a multitude of factors that had to do with time and space.⁷⁸² Since the judge must establish such causality based on science and experience,⁷⁸³ the Court took the stance that it should first ask what a scientific law is. In order to answer the question, the Court proceeded to set out a number of parameters in alphabetical order. These parameters were:

⁷⁷⁹ Corte Suprema di Cassazione, 4th Penal Division, Sentence No.47748/2018, Judgment of 19 October 2018 available at

http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snp&id=20181019/snp_en@s40@a2018@n47748@tS.clean.pdf

⁷⁸⁰ Ibid. In the words of the Court 'è utilizzabile anche una legge scientifica che non sia unanimemente riconosciuta essendo sufficiente il ricorso alle acquisizioni maggiormente accolte o generalmente condivise, attesa la diffusa consapevolezza della relatività e mutabilità delle conoscenze scientifiche'

⁷⁸¹ Corte Suprema di Cassazione, 4th Criminal Division, Sentence No.39124/2018, Judgment of 24 May 2018 available at

http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snp&id=20180829/snp_en@s40@a2018@n39124@tS.clean.pdf

⁷⁸² Ibid at 5

⁷⁸³ Ibid

- a) The need for the scientific precept to be general.
- b) The need for the scientific precept to be susceptible to review and verification.
- c) The need for the scientific precept to conform to one scientific theory. Thus, the Court must clarify that the corroboration of a scientific conclusion with an established scientific mantra should not be absolute. Reference is made explicitly to the Daubert standard and its criteria which are also enumerated by the Italian Court.
- d) The scientific precept to be either accepted or not by the wider scientific community.⁷⁸⁴

Along these lines, by applying these parameters, the Court found that lower courts had sufficiently established the casual link between the convicted individuals' omissions and the collapse of the building and rejected the filed petition.⁷⁸⁵ Similarly, Italian scholars have equally argued for the assessment of expert evidence along the Daubert standard in the realm of the Code of Criminal Procedure.⁷⁸⁶ This is because, in Italy, although the new Code does not explicitly endorse the Daubert standard, collaboration between courts and scholars has led to the endorsement of an interpretation that moves towards this direction.

The same can also be said in the case of Poland whose legal system, being an amalgam of the French and German legal traditions, is based on the continental law approach.⁷⁸⁷ Yet, the last few years have seen also an acute influence of common law in various fields, such as securities law, company law, as well as civil and criminal procedure.⁷⁸⁸ When it comes to the

⁷⁸⁴ Ibid at 5-7

⁷⁸⁵ Ibid at 15

⁷⁸⁶ Marco Serraino, "Cronaca di Una Morte Annunciata": Perizia e Perito nel Processo Penale, Tra Tensioni Normative, Istituzionali, Culturali, *La Legislazione Penale*, 17 July 2017 at 12-14 available at <http://www.lalegislazionepenale.eu/wp-content/uploads/2017/09/Serraino-luglio-2017.pdf>

⁷⁸⁷ Beata Gessel-Kalinowska vel Kalisz, *Mixing Legal Systems in Europe: The Role of Common Law Transplants (Polish Law Example)*, 4 *Eur. Rev. Private Law* 789, 793 (2017)

⁷⁸⁸ Ibid at 800-802

latter, this means that criminal proceedings have moved from an inquisitorial to an adversarial mode.

The current Polish Code of Criminal Procedure contains provisions which refer both to the appointment of experts as well as the assessment of their reports by the judge.⁷⁸⁹ As far as the latter is concerned, Article 200 holds that expert reports must contain, inter alia, information on the activities undertaken and the results reached. However, there is no mention in this particular provision about whether or not the experts must also provide details on the pursued methodology and whether this matter is to be assessed by the judge as part of the assessment of the conclusions even though scholars and the Polish Supreme Court have argued that this should be the case. Scholars have argued that judges must have a dialogue with the expert who provides the opinion and must check the validity of the following: the research activities and the way these were performed; the research methods and; the accuracy and probability of the scientific findings.⁷⁹⁰ On this account, the Polish Supreme Court has held that, in the case of expert opinions and reports, judges should not only review the logical correctness of the expert's conclusions but also their scientific validity.⁷⁹¹ This is because in the Polish criminal justice system of free evidence, the judge freely evaluates the evidence material.

The validity of the provided expert report acquired a pivotal position in the Polish Supreme Court's ruling on whether osmology could be deemed as a valid criminal investigation

⁷⁸⁹ Polish Code of Criminal Procedure, Act of 6 July 1997, arts. 193-202

⁷⁹⁰ On this, see Joanna Dzierzanowska & Joanna Studzinska, Assessment of Expert Evidence in Polish Court Proceedings in Comparison to other European countries, 106 Problems of Forensic Sciences 456,458 (2016)

⁷⁹⁰ Polish Supreme Court, III K277/06, LEX no.257859 cited by Jozef Wojcikiewicz, Judges' Attitude towards Scientific Evidence, 3 *Revija za kriminalistiko in kriminologijo*/Ljubljana 64/249,252-253 (2013) available at <https://pdfs.semanticscholar.org/133f/a9e0407b07beaa2944606db3d4b55999b948.pdf>

⁷⁹¹ Polish Supreme Court, III K277/06, LEX no.257859 cited by Jozef Wojcikiewicz, Judges' Attitude towards Scientific Evidence, 3 *Revija za kriminalistiko in kriminologijo*/Ljubljana 64/249,252-253 (2013) available at <https://pdfs.semanticscholar.org/133f/a9e0407b07beaa2944606db3d4b55999b948.pdf>

technique.⁷⁹² The question concerned the use of police dogs for their sense of smell and whether to the extent that these dogs had smelled something suspicious, their findings could be admitted as evidence in criminal proceedings. On this account, the judgment that the Polish Supreme Court issued in November 1999 is path-guiding.⁷⁹³ In this particular judgment, the Court proceeded for the first time to hold that any osmology conclusions should be based on relevant, comparative scent trace tests which should be conducted in a faultless way and thus should be led by an expert. The Court not only held that osmology should be the object of an expert testimony, it also proceeded to outline methodological guidelines aimed at those experts who perform the osmological tests, stressing that the testing should be conducted in an irreproachable manner.⁷⁹⁴

The treatment of the osmology issue by the Polish Supreme Court permits the reader to peruse the importance that this Court attributes to the methodology used by osmologist experts. Thus, in its judgment dated 28 July 2005, the Court accepted that when doubts existed regarding the methodological correctness of the osmological expert analysis, it could admit an additional expert opinion provided by a competent Institute.⁷⁹⁵ Yet, beyond the osmology question, the Polish Supreme Court has held also on other instances that expert opinions should be drafted in an understandable way and should include clear conclusions and a statement of the research methods undertaken.⁷⁹⁶

⁷⁹² Tomasz Bednarek, Legal Aspects of Osmological Expertise available at

<http://www.osmologia.wortale.net/302-LEGAL-ASPECTS-OF-OSMOLOGICAL-EXPERTISE.html>

⁷⁹³ Polish Supreme Court, V KKN 440/99, Judgment, 5 November 1999 cited in Tomasz Bednarek, Legal Aspects of Osmological Expertise available at <http://www.osmologia.wortale.net/302-LEGAL-ASPECTS-OF-OSMOLOGICAL-EXPERTISE.html>

⁷⁹⁴ Tomasz Bednarek, Legal Aspects of Osmological Expertise available at <http://www.osmologia.wortale.net/302-LEGAL-ASPECTS-OF-OSMOLOGICAL-EXPERTISE.html>; Joanna Dzierzanowska & Joanna Studzinska, Assessment of Expert Evidence in Polish Court Proceedings in Comparison to other European countries, 106 Problems of Forensic Sciences 456,458 (2016)

⁷⁹⁵ Polish Supreme Court, V KK 18/05, Judgment, 28 July 2005 cited in Jozef Wojcikiewicz, Judges' Attitude towards Scientific Evidence, 3 Revija za kriminalistiko in kriminologijo/Ljubljana 64/249,253 (2013) available at <https://pdfs.semanticscholar.org/133f/a9e0407b07beaa2944606db3d4b55999b948.pdf>

⁷⁹⁶ Polish Supreme Court, Judgment of 28 May 2001, IV KKN 89/01, LEX No.51839 cited in Joanna Dzierzanowska & Joanna Studzinska, Assessment of Expert Evidence in Polish Court Proceedings in

6.3.2 The Daubert Standard and the Transition from the Inquisitorial to the Adversarial System: China, Japan, and South Korea as Case Studies in the Far East

Despite the fact that they face important cultural, historical, and political differences, China, Japan, and South Korea are examples of three states defining a wider geographical region in the Far East that have never formally been under European colonization, yet have engaged in the continental/common law nexus when it comes to criminal procedure. Thus, as noted above, although these countries come from a continental law background, they have adopted elements which denote acceptance of the Daubert standard precepts mainly through the interpretative functions of their domestic courts.

For example, with the exception of the Portuguese dominance over Macau and the British colonization of Hong-Kong, China is a country where European powers never set foot.⁷⁹⁷ This lack of physical dominion of the West on the Chinese political and legal systems rendered China the ability to develop itself with no preconditions or expectations of either the continental or the common law model. This does not mean, though, that the Chinese legal system has been untouched by any Western legal influences. The official evidence law was enacted towards the end of the Qing dynasty (1636–1912) and involved the transplantation of the legal system of Germany as well as that of Japan.⁷⁹⁸ While some scholars have seen such

Comparison to other European countries, 106 Problems of Forensic Sciences 456,458 (2016). See also Appellate Court in Gdansk, Judgment, 18 February 2015, II Aka 7/15 at Judicial Quarterly, IV 2015 at 249, 255 (in Polish) available at <http://kwartalnik.gdansk.sa.gov.pl/assets/kwartalnik/2015.4.pdf>

⁷⁹⁷ For the fact that even after the withdrawal of the British, the Hong Kong Special Administrative Region still retains its own common law-inspired legal system and thus does not fall in the analysis contained in the current section see Ronald Yu, Electronic Evidence and Electronic Discovery in the Hong Kong Special Administrative Region, People's Republic of China, 13 Digital Evidence & Electronic Signature L. Rev. 26 (2016)

⁷⁹⁸ Nanning Zhang & Douglas Walton, Recent Trends in Evidence Law in China and the New Evidence Scholarship, 9 Law, Probability and Risk 103,104 (2010)

Western influence as an anathema, others have pointed to the opportunities that such interaction with the West posed, as the Chinese legal system had the opportunity to adopt a system based on either the continental or common law countries. In fact, it has been argued that, particularly when it comes to the law of evidence, the Chinese legal system is not only seen as an amalgam of the continental and the adversarial law traditions,⁷⁹⁹ but also as further moving from the continental law model towards the Anglo-American one.⁸⁰⁰ This is because China's legal system has features such as the inclusion of lay assessors in criminal trials⁸⁰¹ and also due to the fact that since the 2012 amendment to the Criminal Procedure Law, there is a possibility for witnesses to give oral testimony before courts pursuant to the adversarial law precepts.⁸⁰²

The Chinese legal system is, *in principio*, highly reminiscent of the continental one.⁸⁰³ Along these lines when it comes to the role of experts in the oral phase of the trial, it is the court, rather than the parties, that has the prerogative of ordering an expert to testify.⁸⁰⁴ The parties can appoint their own experts, but only in order to refute the provided expert's opinion.⁸⁰⁵ As stated Article 192 of the Code of Criminal Procedure, parties can appoint their experts in order to assist in the cross-examination of the expert evidence.⁸⁰⁶ Yet, largely, the role of experts in criminal proceedings is not considered crucial by the judges, with expert

⁷⁹⁹ Richard Wise et al., A Comparison of Chinese Judges' and US Judges' Knowledge and Beliefs about Eyewitness Testimony, 16 Psychology, Crime & Law 695,699 (2010)

⁸⁰⁰ Nanning Zhang & Douglas Walton, *supra* note 799 at 114

⁸⁰¹ Richard Wise et al., *supra* note 800

⁸⁰² For the fact that the particular amendment and its content regarding witness oral testimony in criminal proceedings moved Chinese criminal law closer to the Anglo-American common law heritage see Zhuhao Wang & David Caruso, Is an Oral-Evidence based Criminal Trial possible in China? 21 Int'l. J. Evidence & Proof 52,53-54 (2016) (referring also to the problems posed to the actual testifying of witnesses in oral proceedings despite such possibility granted by law)

⁸⁰³ Nanning Zhang & Douglas Walton, *supra* note 799 at 104,112

⁸⁰⁴ Bangda Chen, Examining Scientific Evidence in U.S. and Chinese Courts: A Comparative Study, 2 J. Forensic Sci. Med. 151, 156 (2016)

⁸⁰⁵ Criminal Procedure Law of the People's Republic of China, art.145, 1 July 1979 available at <https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china>

⁸⁰⁶ *Ibid*, art. 192; For a criticism on the institution of expert assistants based on the fact that these expert assistants do not have the same rights as expert witnesses see Bangda Chen, *supra* note 805

opinions being perceived to be ‘outside the legal scope of evidence.’⁸⁰⁷ As a result, an expert seldom appears before the courts to present his or her conclusions orally and receive the questions of the parties.⁸⁰⁸ Once this though does happen, the questions do relate also to the reliability of the pursued forensics method.⁸⁰⁹ In other words, once the oral discussion of forensic evidence takes place, the *Daubert*-inspired scientific reliability parameter becomes a consideration to be examined. Although this does not mean an automatic embedment of the *Daubert* standard in the Chinese criminal order, it does mean that the Chinese legal system is not hostile to the standard and its precepts.

Along these lines, it is characteristic that the Rules Concerning Questions about Examining and Judging Evidence in Death Penalty Cases published in 2010 by the Chinese Supreme Court, the Supreme People’s Procuratorate, and the Ministries of Public Security, State Security, and Justice, hold that, in coming to assess expert opinions, the judge will examine, inter alia, whether ‘the procedures, methods and analytical process used in the expert evaluation satisfy the required professional inspection and evaluation procedure and techniques.’⁸¹⁰ Moreover, judges are instructed to examine whether or not the evidence evaluation criteria, including details on the expert’s inspection method, have been satisfied.⁸¹¹ Consequently, errors in the expert’s evaluation methods and procedures must lead criminal courts to hold that the provided expert opinion cannot serve as a basis for the defendant’s conviction.⁸¹²

⁸⁰⁷ Cong-Rui Qiao, Emerging Role of Expert Opinions in Chinese Criminal Justice, Blog of the Montaigne Centre for Rule of Law and Administration of Justice, 24 April 2017 available at <http://blog.montaignecentre.com/index.php/636/emerging-role-of-expert-opinions-in-chinese-criminal-justice/> (discussing also how the role of experts in Chinese criminal proceedings is to become more cardinal)

⁸⁰⁸ Cheng Yan, The Guarantee of Reliable Application of Expert Testimony from the Perspective of Expert Witnesses’ Appearance in PROOF IN MODERN LITIGATION: EVIDENCE LAW AND FORENSIC SCIENCE PERSPECTIVES (David Caruso & Zhuhao Wang eds., Barr Smith Press, 2017) 80

⁸⁰⁹ Bangda Chen, *supra* note 805

⁸¹⁰ China’s New Rules on Evidence in Criminal Trials, (translated by Dui Hua) 43 Int’l. L. & Politics 739, 756-57 (2011)

⁸¹¹ *Ibid*

⁸¹² *Ibid*

Similar stipulations and language are included in the Chinese Supreme Court's judicial interpretation of the overall criminal procedure arrangements.⁸¹³ Article 84(4) of the Supreme Court's interpretational rules states that there is a need for the expert's method to be subject to assessment by the judge who is instructed not to consider such reports when the expert's 'evaluation process and methods do not meet the requirements of professional regulations.'⁸¹⁴ Whereas the Daubert standard is not explicitly mentioned, the need for the judge to take into account the validity of the expert's methodology is an indirect reference to the *Daubert* trilogy.

Like China, Japan is a country which was never conquered by Western powers. Along these lines, any western influences in its legal system did not come as a result of a western imposition, but rather as a decision of its rulers to turn their eyes towards the West in coming to shape the country's legal landscape. The Meiji restoration in the middle of the 19th century saw Japan adopting the continental law inquisitorial system for its criminal procedure and a code of criminal procedure modelled after the French Napoleonic relevant code.⁸¹⁵ The 1922 Code of Criminal Procedure was based on German law and this continental law influence has remained evident even after World War II and is mirrored in the new Code of Criminal Procedure that was enacted after the war in 1948.⁸¹⁶ The Code has been amended until then to address contemporary challenges that the Japanese criminal justice faces,⁸¹⁷ but its main

⁸¹³ For the fact that one of the functions of the Chinese Supreme Court is to issue judicial interpretations aimed at clarifying unclear or ambiguous legislation see Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 *Chicago J. Int'l. L.* 133, 135 (2006); Jia Li & Zhuhao Wang, *A Trail to Modernity: Observations on the new Developments of China's Evidence Legislation Movement in a Global Context*, 21 *Indiana J. Global L. Studies* 683, 690 (2014)

⁸¹⁴ The Supreme People's Court's Interpretation on the Application of the PRC Criminal Procedure Law, 27 January 2013 available at <https://www.chinalawtranslate.com/%E6%9C%80%E9%AB%98%E4%BA%BA%E6%B0%91%E6%B3%95%E9%99%A2%E5%85%B3%E4%BA%8E%E9%80%82%E7%94%A8%E3%80%8A%E5%88%91%E4%BA%8B%E8%AF%89%E8%AE%BC%E6%B3%95%E3%80%8B%E7%9A%84%E8%A7%A3%E9%87%8A/?lang=en>

⁸¹⁵ Supreme Court of Japan, *Outline of Criminal Procedure in Japan* (2014) at 4 available at http://www.courts.go.jp/english/vcms_lf/20140417-criminal-design.pdf; B.J. George Jr., *Rights of the Criminally Accused*, 53 *Law & Contemporary Problems* 73 (1990)

⁸¹⁶ Haruo Abe, *Criminal Procedure in Japan*, 48 *Criminal L., Criminology & Police Science* 359 (1957)

⁸¹⁷ Minoru Shikita & Shinichi Tsuchiya, *CRIME AND CRIMINAL POLICY IN JAPAN: ANALYSIS AND EVALUATION OF THE SHOWA ERA 1926-1988*, Springer-Verlag (1992) 107-108; Sayuri Umeda, *Japan: 2016 Criminal Justice*

orientation towards the inquisitorial system remains intact.. At the same time, after World War II and the Japanese defeat, it bears also considerable elements stemming from the Anglo-American legal tradition⁸¹⁸ due to the American presence on the country.⁸¹⁹

Along these lines, Article 165 of the Criminal Procedure Code stipulates that the court may order a person of relevant knowledge and experience to testify as an expert, yet it does not contain any provision of the elements that the expert's report must contain or how it is to be assessed by the judge. When it comes to expert witnesses in criminal trials, the focus in the Japanese system is on the identity of the expert rather than the appraisal of his or her findings which is similar to the case in those countries that follow the inquisitorial system. At the same time, the Japanese Criminal Procedure differs from other inquisitorial countries in that Article 321(4), outside the framework established for the role of expert witnesses, holds that a document that contains the expert's conclusions as well as the methodology used to reach these conclusions should be admitted as evidence.⁸²⁰ The reference to both the expert report's conclusions as well as to his line of thinking underlines the similarity to the methodological issues that fall under the review of *Daubert*.

Having said this, it is equally true that in Japan, evidence has been traditionally viewed by professional judges and the law of evidence has been based on the perusal of thousands of documents. This has made judges averse to resorting to an expert's help and insights.⁸²¹ ⁸²²

System Reform, November 2016 available at <https://www.loc.gov/law/help/criminal-justice-system-reform/japan-criminal-justice-system.pdf>

⁸¹⁸ B.J. George Jr., Rights of the Criminally Accused, 53 Law & Contemporary Problems 71-72 (1990)

⁸¹⁹ Eric Feldman, Law Across Borders: What can the United States learn from Japan? 32 Hastings Int'l. & Comp. L. Rev. 795,796 (2009)

⁸²⁰ William Cleary, The Law of Criminal Procedure in Contemporary Japan, Hokkaido University, 28 March 1991 available at https://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/16783/1/41%284%29_p512-454.pdf

⁸²¹ Hirano Tetsuro, Discussion between Experts and Lawyers in Court: Proposal of 'Conference of Evidence' for Litigation requiring Expertise in Japan, 33 Ritsumeikan L. Rev. 13 (2006). For the fact that the judge did not allow an expert witness called by the defence to testify even in a case involving capital punishment see David Johnson, Progress and Problems in Japanese Capital Punishment in CONFRONTING CAPITAL PUNISHMENT IN ASIA (Roger Hood & Surya Deva eds.,2013) Oxford University Press, 176

⁸²² Hirano Tetsuro, *ibid*. For the fact that the judge did not allow an expert witness called by the defence to testify even in a case involving capital punishment see David Johnson, Progress and Problems in Japanese

Similar to the stance in the inquisitorial system, the aim was for the judges to thoroughly investigate all matters that were brought before them in the course of the proceedings, even if these were brought in *passim* to the main question of the defendant's guilt or innocence. As a result, the tendency was for judges to admit all of the evidence and then assess it later rather than to hold a high admissibility threshold which would permit them to reject *prima facie* certain pieces of evidence as is the case in the adversarial system.⁸²³

This turn of the Japanese criminal procedure towards the adversarial model happened slowly and gradually. A major reform in 2001 affected the role of experts before Japanese courts in civil trials,⁸²⁴ since in the criminal field such a massive reform was not possible due to the hurdles posed by the exigencies of the criminal proceedings and the difficulty to figure out how to enrich criminal trials based on adversarial principles such as these of directness and orality.⁸²⁵ Nevertheless, in 2009, the prospects for Japanese criminal justice to move towards the adoption of the adversarial model became more evident⁸²⁶ on account of the introduction of the *saiban-in* system.⁸²⁷

This does not mean that through the *saiban-in* system, the institution of the jury was introduced in Japanese criminal trials,⁸²⁸ but rather, that in serious criminal cases, six citizens,

Capital Punishment in CONFRONTING CAPITAL PUNISHMENT IN ASIA (Roger Hood & Surya Deva eds., 2013) Oxford University Press, 176

⁸²³ Kayoko Ishida, Evidence Law in Japan and Australia: Principles, Practice and Reform, 22 Zeitschrift für Japanisches Recht 77 (2006)

⁸²⁴ Sayuri Umeda, Japan: 2016 Criminal Justice System Reform, November 2016 available at <https://www.loc.gov/law/help/criminal-justice-system-reform/japan-criminal-justice-system.pdf>

⁸²⁵ Ibid., Part 2(1). For the fact that Japan's criminal system moves towards the adversarial model see also the introduction of the plea-bargaining in criminal trials based on a reform of 2016 which became effective in 2018. On this see Japan's New Plea-Bargaining System: A Tough New Compliance Risk for Companies with Japan Operations?, NO& T Japan Legal Update, March 2017 available at https://www.noandt.com/en/publications/newsletter/documents/japan_no09.pdf

⁸²⁶ David Johnson, Criminal Justice in Japan in LAW IN JAPAN: A TURNING POINT, Daniel Foote ed., University of Washington Press (2007) 364

⁸²⁷ Philip Reichel & Yumi Suzuki, Japan's Lay Judge System: A Summary of its Development, Evaluation and Current Status, 25(3) Int'l. Crim. Justice Rev. 247, 257 (2015)

⁸²⁸ For the fact that jury used to exist in Japanese courts and on how the people did not look favourably to the jury model see Philip Reichel & Yumi Suzuki, *ibid* at 248

chosen at random, are hence ordained to serve as lay judges for one trial and deliberate together with three professional judges on the defendant's verdict and sentence.⁸²⁹ Yet, as a result of the saiban-in introduction to the trials, echoing the orality principle, criminal courts started relying less on written evidence and more on oral testimony.⁸³⁰

The saiban-in's lay status and their inability to cope with a bulk of evidence, has already prompted scholars to argue for the institution of admissibility guidelines when it comes to the presented evidence before the court.⁸³¹ Although the Japanese Code of Criminal Procedure has not been amended to explicitly incorporate the Daubert standard criteria, it would not be an exaggeration to argue that these criteria can be easily accommodated inside the Japanese criminal system. In fact, when it comes to civil litigation, scholars have lamented the fact that even though Japanese courts have started suggesting that the parties bring in their own experts, other than these appointed by the court, in case the parties' experts' reports are conflicting, there are no rules for the judge to adopt the one over the other.⁸³² The introduction of the Daubert standard in Japanese law would solve this problem.

Moreover, such an introduction would hold also a particular regional gravity given the region's history and the influence Japanese law has come to exert over other legal systems such as that of Korea due to the peninsula's Japanese occupation. Today, the adoption of a communist regime by North Korea renders it more difficult to trace any Japanese influences in its legal system, but such influences are more readily perceivable in the legal arrangements which are in place in South Korea. The legal system in South Korea, including its criminal

⁸²⁹ Kayoko Ishida, *supra* note 823; Philip Reichel & Yumi Suzuki, *supra* note 828 at 249

⁸³⁰ Philip Reichel & Yumi Suzuki, *supra* note 828 at 252

⁸³¹ Kayoko Ishida, *supra* note 823

⁸³² Hirano Tetsuro, *supra* note 823 at 16

justice one, is heavily influenced by the European civil one due to the fact that the Japanese imposed their own system, namely a continental law-prone one, on the country.⁸³³

The continental law influence on Korea's legal system remained in place even after 1945 and the Japanese retreat.⁸³⁴ Yet, while still entrenched in its continental law origins, in 2007 the South Korean criminal justice system underwent a major reform which, for the first time, resulted in the introduction of the jury in criminal trials⁸³⁵ pursuant to the adversarial model. It is noteworthy that even before this reform, when it came to expert evidence, the Korean Code of Criminal Procedure dated from 1954 (*Criminal Procedure Act* from 2007 and hence) stipulated that the experts' reports should 'clearly' contain the reasons behind these opinions.⁸³⁶ Such a stipulation has driven scholars to argue that 'requiring experts to include their background and their research procedure in a written report of their arguments, would permit the court to better appreciate the framework and methodology responsible for the expert findings.'⁸³⁷ In that sense, although the *Daubert* reliability requirement has not been explicitly acknowledged, it is largely implied in Korean criminal procedure. It could be argued that if Japan also adopted the *Daubert* standard, such an endorsement could give a regional dynamic to the notion leading also Korea to explicitly proclaim it as part of its Code of Criminal Procedure. The effect such a regional dynamic can have to the inclusion of the *Daubert* parameters explicitly in national codes of criminal procedure, can be seen in the case of Latin America. It is the Latin American example that will be discussed in the next subsection.

⁸³³ Eric Ilhyung Lee, Expert Evidence in the Republic of Korea and under the U.S. Federal Rules of Evidence: A Comparative Study, 19 Loy. L.A. Int'l. & Comp. L. Rev. 585, 588 (1997)

⁸³⁴ Ibid

⁸³⁵ Hiroshi Fukurai et al., Is Mexico Ready for a Jury Trial? Comparative Analysis of Lay Justice Systems in Mexico, the United States, Japan, New Zealand, South Korea and Ireland, 2 Mexican L. Rev. 3, 18

⁸³⁶ Korea *Criminal Procedure Act* (as last amended by Act No. 8730, Dec.21 2007), Art.171

⁸³⁷ M. Neil Browne et al., The Perspectival Nature of Expert Testimony in the United States, England, Korea and France, 18 Connecticut J. Int'l. L. 55,101 (2002)

6.3.3 The Daubert Standard and the Transition from the Inquisitorial to the Adversarial System: Mexico, Peru, Colombia, and Chile as Case Studies in Latin America

The Latin American paradigm holds particular importance. Despite the fact that, historically, its legal systems have continental law roots incorporating principles of the French, Italian, and Spanish legal systems,⁸³⁸ there has been a considerable number of reforms in the criminal law systems of Latin American countries in the last few decades that indicate a shift from the inquisitorial to the adversarial system or at least to a mixed one that entails adversarial elements.⁸³⁹ This shift should not be seen as an isolated attempt by these countries to merely change their criminal justice system. Rather, it is part of a larger phenomenon linked to these countries' conscious efforts to instil transparency and more effective participation of the defendants in their criminal proceedings.⁸⁴⁰

Quite notably, in some cases, as described below, this transition is also underlined linguistically through the new code of criminal procedure being called 'Codigo Procesal Penal' rather than 'Codigo de Procedimiento Penal'. While, in both cases, the term can be translated exactly as 'Code of Criminal Procedure', still, the use of a different phraseology for the introduction of a new legislative text bears its own semantics. Moreover, as discussed in this thesis, while some countries such as Brazil still have not switched to the adversarial model⁸⁴¹ possibly implying the creation of a regional custom,⁸⁴² other Latin American countries have

⁸³⁸ Jorge L. Esquirol, *The Fictions of Latin American Law* (Part I), 1997 Utah L. Rev. 425,462-63 (1997); George Mousourakis, *ROMAN LAW AND THE ORIGINS OF THE CIVIL LAW TRADITION*, Springer (2015) 298

⁸³⁹ Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 American Journal of Comparative Law 617 (2007); Leonard Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why some Latin American lawyers Hesitate*, 53 Wayne L. Rev. 785 (2007)

⁸⁴⁰ Gregory W. O' Reilly, *Opening up Argentina's Court*, 80(5) Judicature 237 (1997) (citing the case of Argentina)

⁸⁴¹ On this, see *Codigo de Processo Penal*, Decreto-Lei No. 3689, 3 October 1941, articles 275-281

⁸⁴² For discussion of the Asylum case before the ICJ where the Court addressed and rejected Colombian arguments for the creation of a regional custom in Latin America see Anthony d'Amato, *The Concept of Special*

done so, indicating the adherence of the region to a certain model in criminal procedure that emphasizes a tendency that cannot be underestimated once the dynamics of the Daubert standard and its potential to constitute a general principle of law are considered. This adherence is further underlined by the fact that even in Latin American countries that have not proceeded to incorporate the Daubert standard features in their criminal procedure codes,⁸⁴³ there are signs of these features given that, under the new adversarial mode codes, experts are required to discussed their findings orally.⁸⁴⁴ On this account, there are a number of Latin American countries which have made in the recent years this adversarial turn.

Mexico is one of these. Historically, the country's criminal law model has been based on continental law. The emperor Maximilian (1864–1867) briefly introduced the French criminal law code, whereas Benito Juárez, the president of Mexico, brought the Spanish model to the country.⁸⁴⁵ Then, in 1934, the Criminal Procedure Code (Codigo Federal de Procedimientos Penales) was adopted along the premises of the inquisitorial system,⁸⁴⁶

Custom in International Law, 63 *American J. Int'l. L.* 211 (1969); Michael Scharf, *Accelerated Formation of Customary International Law*, 20 *ILSA J. Int'l. & Comp. L.* 305,311 (2014); Laurence Helfer & Ingrid Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 *Michigan J. Int'l. L.* 563,572 (2016)

⁸⁴³ On this, see for example the Bolivian Code of Criminal Procedure, article 213 (Codigo de Procedimiento Penal, Law No.1970, 25 March 1999) (stating only that the experts' report will be founded and will describe in clear and precise way the relationship between the actions undertaken by the expert and the reached results, ordaining that these results should be relevant but saying nothing on the review of the followed methodology in order for the judge to assess on his own whether they are also reliable.) See also the case of Argentina which has adopted the adversarial system without though its Code of Criminal Procedure adopting also the Daubert criteria. Articles 161-164 of the National Code of Criminal Procedure hold that in order to prove their stance on a matter requiring expertise knowledge, the parties can bring before the court reports compiled by experts and these experts must be accredited and present their findings in a substantiated and clear way, demonstrating the relevance of their conclusions to the facts of the case, without though discussing also how the judge is to assess the epistemological reliability of the provided report. On this see Codigo Procesal Penal de la Nacion, Ley 27063, 10 December 2014

⁸⁴⁴ For arguments that adoption of the adversarial system should equally see the adoption of Daubert by the new Argentinian Code of Criminal Procedure see Mauricio Duce, *La Admisibilidad de la prueba pericial a juicio oral en la Argentina: Analisis de Tres Codigos Procceral Penales* in *PROBLEMAS ACTUALES DEL DERECHO PROCESAL PENAL*, Daniel Pastor & Nicolas Guzman eds., 2012, 481-482. For the case of Mexico see Gloria Capistran Colunga, *Las Victimas de la Violencia y la Prueba Psicologica en los Tribunales y el Juicio Oral*, 7 *Nuevo Sistema de Justicia Penal* 10, 12 (2014)

⁸⁴⁵ David Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3(2) *Mexican L. Rev.* 189,198 (2011)

⁸⁴⁶ *Ibid* at 199

although Mexico never fully adopted the inquisitorial model.⁸⁴⁷ Thus, judges were left with the discretion to question the various witnesses, including the experts, during the proceedings.⁸⁴⁸ Yet, when it came to expert witnesses, judges rarely resorted to them, relying, instead, on the testimonies of either the defendant or the victim in order to reach a verdict.⁸⁴⁹ Even when experts were contacted, it was difficult for both defendants and victims to access the experts' findings or understand the methodology undertaken,⁸⁵⁰ this leading to a situation where both the defendant's as well as the victim's rights were jeopardized.⁸⁵¹

The systemic weaknesses that the application of the inquisitorial system in Mexico entailed, were rendered more acute in light of the dire criminal challenges that Mexico had to confront. For years, the country was hit with high criminality rates that led to the courts becoming overloaded due to the large number of criminal cases reaching the courts. The inquisitorial system led to lack of transparency in the followed procedures, to the detriment of the defendants' rights.⁸⁵² Along these lines, in 2008, the Mexican Congress decided to adopt the adversarial system for their criminal proceedings. What is interesting in the case of Mexico is that instead of the legislature amending the relevant provisions in the Code of Criminal Procedure, the Mexican Congress deemed it right to entrench the system change on a constitutional level. Under Article 20 of the Mexican constitution in its current form, criminal proceedings follow the adversarial system and are oral.⁸⁵³ With Mexico being a federal state comprised of different state jurisdictions, as is the case in the U.S.,⁸⁵⁴ Congress envisioned that

⁸⁴⁷ Ibid at 204

⁸⁴⁸ Ibid at 203-204

⁸⁴⁹ Carlos Nataren, Notes on Criminal Process and Constitutional Reform in Mexico Today, 4(1) Mexican L. Rev. 99, 103 (2011)

⁸⁵⁰ Ibid

⁸⁵¹ Ibid

⁸⁵² David Shirk, *supra* note 845 at 194-195

⁸⁵³ *Constitucion Politica de los Estados Unidos Mexicanos*, 5 February 1917 (as amended by 27 August 2018)

⁸⁵⁴ On this it is indicative that the Mexican constitution speaks in its title of being the constitution of the 'Mexican United States' (*Estados Unidos Mexicanos*)

the constitutional changes that were put into force and the new Code of Criminal Procedure would apply in all Mexican territory by 2016.⁸⁵⁵ A draft Code was proposed for this aim.

The Mexican Supreme Court has not explicitly referred to *Daubert* and while it has not discussed its criteria in criminal law cases, it has endorsed it in non-criminal law cases.⁸⁵⁶ Whereas the current thesis only focuses on the application of *Daubert* specifically when it comes to criminal law procedure, one of the cases brought before the Mexican Supreme Court outside the criminal law framework highlights the thesis argument of how the application of the *Daubert* standard should be seen as combining both general, scientific findings and individualized reports and thus will be briefly discussed.

The case concerned a member of the Armed Forces, who after being diagnosed with epilepsy, was asked by the army to retire. Contesting the army decision, the serviceman argued that the provision in Mexican law that held that epilepsy was a cause for compulsory retirement from the army was unconstitutional because it violated the principle of equality and the prohibition against discrimination.⁸⁵⁷

The case reached the Supreme Court.⁸⁵⁸ There, the military serviceman argued that the medical certificate with which he was diagnosed with epilepsy was not scientifically reliable and could not be taken into account given that the military doctors did not explain the premises

⁸⁵⁵ Ivonne Nohemi Diaz, *Armonización de la Legislación Procesal Penal en el Sistema Acusatorio Mexicano* (2015) 115 available at <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3826/10.pdf>

⁸⁵⁶ For example, in a case concerning paternity claims and involving a DNA examination, the Court held that the scientific evidence should be relevant and reliable and thus should have been empirically tested, accepted by the scientific community, state the margin of error and be susceptible to standards that can inform on its application. On this see National Supreme Court of Justice, *Contradicción de Tesis: 154/2005-PS, Entre las Sustentadas por los Tribunales Colegiados en Materia Civil, Tercero del Segundo Circuito y Tercero del Cuarto Circuito*, Judgment, 18 October 2006 at 24-25 available at <http://207.249.17.176/Transparencia/Epocas/Primera%20sala/Novena%20C3%A9poca/2005/20.pdf>

⁸⁵⁷ Jose Ramon Cossio Diaz, *La Epilepsia como Causa de Inutilidad en las Fuerzas Armadas*, 147 *Gaceta Medica de Mexico* 365 (2011)

⁸⁵⁸ *Amparos en revision numeros 516/2010 y 725/2010*, 1era Sala de la Suprema Corte de la Justicia de la Nacion, Judgment, 16 March 2011

upon which they based their conclusions and they resorted little to relevant bibliography and did not add the photostatic copies upon which they based their opinion. On these grounds, the Court had to assess whether the conclusions of the medical certificate could be buttressed by science and thus could be upheld with no further need to go into details of the certificate's methodological validity.

The Court was divided on the issue. The majority of the judges opted to rely on a scientific article on epilepsy that they found online that stated that epilepsy was an illness. Along these lines they ruled that the provision in Mexican law was constitutional and the Armed Forces could retire the particular serviceman without entering the discussion of whether the medical certificate could be deemed to be scientifically valid.⁸⁵⁹ On the other hand, the dissenting judge, Justice Minister Cossio Diaz, held that the provision was unconstitutional to the extent that it was too wide and it considered epilepsy as grounds for compulsory retirement in all cases, notwithstanding the fact that, according to science, there can be mild forms of epilepsy too which would permit an individual to continue his army service.⁸⁶⁰ Thus, similar to the way Daubert opts to see science and the assessment of scientific evidence, for Justice Minister Cossio Diaz it is each individual case that matters and any assertions contained in the medical certificate can be reviewed by the judge not *in abstracto* based on whether for example epilepsy is generally a disease and thus would not be unreasonable for the doctors to claim that

⁸⁵⁹ Jose Ramon Cossion Diaz, *supra* note 857 at 366

⁸⁶⁰ Ibid at 369. For the fact that Justice Cossio Diaz ruled likewise in a similar case where HIV and not epilepsy was the ground of a person being compelled to retired from the military forces, see National Supreme Court of Justice, Seguridad Social para las Fuerzas Armadas Mexicanas: El Articulo 226, Segunda Categoria, Fraccion 45 de la ley del Instituto Relativo que Preve la Causa Legal de Retiro por Inutilidad basada en la Seropositividad a los Anticuerpos contra el Virus de la Unmunodeficiencia Humana (VIH) viola el Articulo 1 de la Constitucion Federal, *Semanario Judicial de la Federacion y su Gaceta*, Tomo XVII, April 2008, Concurrent vote of Justice Minister Jose Ramon Cossio Diaz available at <https://sjf.scjn.gob.mx/SJFSist/Paginas/Reportes/ReporteDE.aspx?idius=20953&Tipo=3&Tema=0>

the serviceman before them did suffer from it, but whether this should be the case *in concreto* for the particular serviceman given the scientific findings of the doctors in the particular case.⁸⁶¹

The Mexican precedent in the endorsement of the adversarial system in criminal justice and within it the adoption also of Daubert, has a special value when it comes to other Latin American countries which face grosso modo the same criminality problems and have equally decided to make a turn towards the adversarial system in their criminal proceedings. Peru is such an example. For years, similar to the situation in Mexico, Peru's criminal justice system was founded on the inquisitorial system. The Code of Criminal Procedure (Codigo de Procedimientos Penales), already in place from 1940, was based on the inquisitorial precepts and ordained that judges would be responsible for the appointment of experts who should be accredited experts in their fields.⁸⁶² In cases where there were no such accredited experts, the judge could rely on the expertise of persons of 'known for their honesty and competence on a subject matter.'⁸⁶³ Quite interestingly, Peru's Code did not include anything about the experts' reports and what these should contain. Rather, it just noted that judges will set the terms under which the experts must present their opinions and continued to delineate the procedure for the oral examination of the experts by the court.⁸⁶⁴

In 2004, a new Code was introduced in Peru that embraced the adversarial model.⁸⁶⁵ The Code contains an explicit provision on the content of the experts' reports.⁸⁶⁶ Section 178, titled 'Content of the Experts' Report', holds that such reports must contain details of the experts' qualifications, a description of the facts on which the expert opinions were given, and-

⁸⁶¹ Jose Ramon Cossion Diaz, *ibid* at 368-369

⁸⁶² Codigo de Procedimientos Penales, Sections 162 & 167 available at https://www.oas.org/juridico/mla/sp/per/sp_per-int-text-cpp.pdf

⁸⁶³ *Ibid*

⁸⁶⁴ *Ibid*

⁸⁶⁵ Pablo Talavera Elguera, *La Prueba en el Nuevo Proceso Penal: Manual del Derecho Probatorio y de la Valorizacion de las Pruebas en el Proceso Penal Comun*, Lima, March 2009 at 24

⁸⁶⁶ Nuevo Codigo Procesal Penal, Decreto Legislativo No. 957, July 2004 available at http://www.oas.org/juridico/pdfs/mesicic4_per_cod_procesal.pdf

most importantly for the current discussion- the foundations of any technical examinations, and citations of the scientific, technical, or medical criteria and the principles used by the experts to conduct their work.⁸⁶⁷

The *Daubert* influence is evident in the explicit reference to the need for the scientific methodology to be present in the expert reports so that judges will be able to review it. Along these lines, Section 178 must be read in conjunction with the reference to science in Section 172 where, contrary to the phraseology endorsed by the previous Code, there is an explicit reference to the fact that experts must have scientific or technical knowledge. Moreover, the elements that the expert's report must comprise are included in Section 178 as part of a list which echoes the way the U.S. Supreme Court opted to list the relevant requirements in *Daubert*.

The impact *Daubert* has exerted on the way expert opinions and reports are to be assessed in the course of criminal proceedings can also be discerned in the jurisprudence of the Peruvian Supreme Court. For example, in the case of Oyarse, the Court had to pronounce on the guilt or innocence of the defendants who were accused of pushing a player to his death during a football match.⁸⁶⁸ Reviewing the circumstances of the victim's death, the Court had to call expert witnesses in order to establish whether the victim fell on his own after retreating in order to avoid the defendants or he was actively pushed to his death. In coming to assess the provided experts' opinions and reports, the Court did not explicitly mention *Daubert*, but it did refer to the *Daubert* standard's criteria. In doing so, the Court held that that in order for it to assess the rigor of the undertaken methodology, the experts' reports should mention both the

⁸⁶⁷ Ibid, Section 178

⁸⁶⁸ Corte Suprema de Justicia de la Republica, Sala Penal Transitoria, R.N.No 1658-2014, Lima, 15 March 2016; Adrian Simons Pino, La Prueba Cientifica, 18 Revista Eletronica de Direito Processual (2017) 4,18

rationale through which their conclusions were reached as well as any undertaken discussions and deliberations the experts held before reaching the particular conclusions.⁸⁶⁹

Colombia is another Latin America country which similarly to Peru, saw in 2004 the introduction of a new Code of Criminal Procedure. The adoption of the Code marked the end of Colombia's continental law tradition involving judges commissioning expert opinions⁸⁷⁰ and the beginning of its move towards the adversarial system and the U.S. Daubert standard.⁸⁷¹ According to the new Code, it is the parties who call on the experts.⁸⁷² Section 406 ordains that experts are to be drafted not only by private entities but also from state institutions, for example the National Forensics Institute.

Echoes of Daubert are evident in the Colombian Code not only from the way the judge must evaluate the expert opinions, but also from how experts are to be examined in court, and how the question of which scientific methodology was used must be clarified even during oral examinations. Scientific methodology is also a concern when judges evaluate the provided expert opinion, as Section 420 clearly renders that the judge is to take into account not only the experts' 'scientific and moral integrity' but also the degree of acceptance of the experts' arguments among the scientific community and the methods used by the experts to reach the particular conclusions. This requirement is further stressed in Section 422, where the Code explicitly refers to 'scientific publications' and stipulates that, in order for them to be admissible as evidence, they must satisfy a number of conditions which the Code comes to enumerate as follows:

⁸⁶⁹ Corte Suprema, *ibid*

⁸⁷⁰ Luis Bernardo Ruiz Jaramillo, *La Prueba Pericial y su valoracion en el proceso penal colombiano, hacia un regimen procesal holistico* (The Expert Testimony and its assessment in the Colombian Criminal Procedure, towards a holistic procedural regime) 45 *Revista de la Facultad de Derecho y Ciencias Politicas-UPB* 481,495 (2015) available at <http://www.scielo.org.co/pdf/rfdcp/v45n123/v45n123a07.pdf>

⁸⁷¹ *Codigo de Procedimiento Penal Colombiano*, Ley 906 de 2004; Luis Bernardo Ruiz Jaramillo, *ibid* at 485

⁸⁷² Luis Bernardo Ruiz Jaramillo, *ibid* at 494

1. The theory has been scientifically verified.
2. The theory has been published and has been addressed by the academic community.
3. The methodology used by the expert is an accredited one.
4. The methodology meets the acceptance of the academic community.

The above conditions make explicit reference to the methodology parameters, particularly in an enlistment mode and clearly show the impact *Daubert* had on the Colombian Code's drafters.

Consequently, the Colombian arrangements cast their own influence on another Latin American country, Chile. The latter is an additional example of a country whose Code of Criminal Procedure shifted during the last few years from the inquisitorial system to the adversarial system.⁸⁷³ This switch is also denoted, inter alia, even in the slight alteration of the Code's title from 'Codigo de Procedimiento Penal'⁸⁷⁴ to 'Codigo Procesal Penal.'⁸⁷⁵ At the beginning of the 20th century, Chile adopted the inquisitorial system for its criminal procedure and this remained in place for years. Yet, in 1995, a new Code of Criminal Procedure was presented to the Chilean parliament with the aim of reforming the country's criminal justice system.⁸⁷⁶ The new Code, which ultimately became law in 2000, signified a split with the inquisitorial system through the introduction of the adversarial system.⁸⁷⁷ As expected, the

⁸⁷³ Bernardo Ramos Pavlov, *Regulacion, Admisibilidad y Valoracion de la Prueba Pericial Penal en el Derecho National*, Master Thesis at the Faculty of Law of the University of Chile, 2013 at 7-8 available at http://repositorio.uchile.cl/bitstream/handle/2250/116579/De36-Ramos_bernardo.pdf;sequence=1

⁸⁷⁴ Codigo de Procedimiento Penal, Ley 1853, 13 February 1906, available at <https://www.leychile.cl/Navegar?idNorma=22960>

⁸⁷⁵ Codigo Procesal Penal, Ley 19696, 12 October 2000, available at <https://www.leychile.cl/Navegar?idNorma=176595>

⁸⁷⁶ Lydia Brashear Tiede, *Chile's Criminal Law Reform: Enhancing Defendant's Rights and Citizen Security*, 54(3) *Latin American Politics and Society* 65, 69–70 (2012)

⁸⁷⁷ *Ibid* at 70

differences were palpably exhibited on matters concerning the appointment and testimony of experts.

Originally, mirroring largely the continental law model established by Spain during the colonial period,⁸⁷⁸ the Chilean Code of Criminal Procedure (Codigo de Procedimiento Penal) held that expert witnesses were to be appointed by judges from a list that was kept by the court and was updated every two years by the Court of Appeals.⁸⁷⁹ These experts were to be competent in the subject in which they provided their opinion.⁸⁸⁰ The reliability parameter was, thus, established concerning the credentials of the persons, similar to the *Frye* paradigm.

When it came to the credentials of the expert reports themselves, Article 237 of the Chilean Code held that the reports needed specific information including: the report's subject, the connection between the acts undertaken by the expert and the results produced and proof that the conclusions abided by scientific principles without though specifying how along a Daubert style standard test, the report's conformity to such scientific principles could be assessed. The nixing of any Daubert application under the previous Chilean Code is further underlined by the fact that the Code in Article 240 stipulated that if any clarification was needed regarding the content of the expert reports, judges were entitled to pose questions to the experts but could not explicitly point to the undertaken methodology.

In contrast to this, the new Chilean Code of Criminal Procedure was based on the adversarial system and a *Daubert*-prone approach.⁸⁸¹ Article 314 holds that it is the prosecution and the parties that have the right to introduce expert opinions and reports to the trial. The same

⁸⁷⁸ Ibid

⁸⁷⁹ Codigo de Procedimiento Penal, Ley 1853, 13 February 1906, Article 221 available at <https://www.leychile.cl/Navegar?idNorma=22960>

⁸⁸⁰ Ibid, arts. 220-221

⁸⁸¹ Mauricio Duce, Admisibilidad de la Prueba en Juicios Orales: Un Modelo para Armar en la Jurisprudencia Nacional, Revista Institucional de la Defensa Publica, 57,63,80-81 (2011) available at <http://www.pensamientopenal.com.ar/system/files/2012/03/doctrina33402.pdf>

Article also requires that the professional credentials of the expert must be provided to the judge and that expert reports should only be used when they are relevant for the proof of a factual point that cannot be illuminated without looking at the related scientific knowledge. It is evident that this provision, which largely incorporates the previous Chilean legal regime, endorses the reliability of experts and the relevancy of their opinions according to the *Frye* requirements. Yet, Article 318 takes a step forward towards *Daubert*, as it states that judges can pose questions to the experts during the oral proceedings in order to ascertain their reliability and the technical or scientific reliability of their conclusions.⁸⁸²

The explicit reference to the technical and scientific reliability resembles Article 221 of the Colombian Code of Criminal Procedure which as discussed above, denotes the influence of the Daubert standard over the choices lawmakers in the specific countries make regarding the assessment of expert evidence,⁸⁸³ brings also the Chilean Code closer to the standard's precepts. Furthermore, an echo of Daubert in the new Code can be found also in article 316 which ordains the judge to examine the 'seriousness' and 'professionalism' not only of the expert but also of his or her report.⁸⁸⁴ It is reasonable to assume that in order for such judicial review to take place, the judge cannot but delve into a Daubert-related task of assessing elements underlying the report's produced conclusions most notably the undertaken scientific methodology and techniques.

⁸⁸² Código Procesal Penal, Ley 19696, 12 October 2000, Article 318 available at <https://www.leychile.cl/Navegar?idNorma=176595>

⁸⁸³ Bernardo Ramos Pavlov, *supra* note 873 at 28

⁸⁸⁴ Código Procesal Penal, Ley 19696, 12 October 2000, Article 316 available at <https://www.leychile.cl/Navegar?idNorma=176595>, For the fact that the credibility of the expert is a separate component to be reviewed by the judge see also Article 276.

6.4 Conclusion

The current chapter detailed the application of the Daubert standard beyond the confines of common law. In that sense, it showed how the standard and the way it comes to look on how the judge must ensure that all matters of expertise are based and discussed on scientifically reliable grounds, can be applicable in jurisdictions all over the globe even if they largely pertain to the continental law tradition. On these grounds, the chapter examined first States like Germany, France and Spain which can be deemed the classical bearers of the continental law tradition and demonstrated how the Daubert reliability precept can be relevant also in these jurisdictions. The role of courts to this extent was particularly stressed. The chapter went on to examine continental law traditions in a broader sense, encompassing in its analysis jurisdictions which albeit historically belong to the continental law family, have opted in recent years to make a turn in criminal procedure to the adversarial system. The chapter further demonstrated how such turn in many cases like in Chile or Colombia, signalled also the entrenchment of the Daubert precepts in the new Code of Criminal Procedure adopted by these countries while in other countries like Peru, such an introduction of the Daubert standard in the domestic legal order should be seen as happening through Supreme Court decisions.

Finally, the chapter put note to the regional dynamic that could trigger the endorsement of the Daubert standard principles and taking as an example the case of Latin America, examined also China, Japan and South Korea in the Far East, as examples of States where despite these countries' strenuous past on a political level, their interwoven legal bonds and influence could possibly lead to a wider Daubert cognizance to the wider Far East region if the standard is explicitly endorsed by one of them.

The applicability in a number of different jurisdictions all over the world of the way Daubert looks upon the need for judges to base their assertions on matters of expertise on scientifically reliable grounds and not suffice to only accept as fait accompli any scientific statements presented by the experts, can give rise to the argument that the Daubert standard-at least as far as this reliability requirement is concerned-constitutes a general principle of law. Its relevance in criminal law as portrayed in all the cases discussed in this and the previous chapter, equally render it a general principle which can be seen as falling under the auspices of article 21 of the ICC Statute.

Yet, even if conceded that the Daubert standard can be introduced to international criminal law, the question is whether international criminal law is amenable to its introduction. The fact that in the phase of the main trial international criminal courts and tribunals have refrained from viewing the assessment of the civilians' suffering through a Daubert prism entailing the request of psychological opinions for the civilians specifically appearing and testifying before the docket, can arguably lead to the assumption that the courts are being led to this practice because taking individualized psychological opinions and reports into account is something that is outside their judicial ethos and legal mindset to the extent that as discussed in chapter 1, international criminal law puts the emphasis on the commission of crimes on a mass scale rather than an isolated, individual basis. In order to discuss this question of international criminal law amenability to Daubert, the next chapter will look how the international criminal tribunals discussed in chapter 2 and the ICC, treat the issue of civilian mental harm in the phases following the main trial.

Chapter 7: *International Criminal Courts and their Institutional Capacity to Engage with Mental Health Experts: A Look at the Stages beyond the Main Trial*

7.1 Introduction

Chapter 2 discussed that when it comes to warfare's psychological impact on civilians, international criminal courts and tribunals call on mental health experts in an inconsistent manner. The current chapter further examines whether this is because these courts and tribunals have an inherent inability to incorporate the findings of mental health experts in their judgments. This question holds significance given the fact that if international criminal courts and tribunals are structurally inept in engaging with mental health experts in an epistemological manner that explicitly includes discussing the relevance of expert reports provided and their scientific reliability to a particular case, any arguments for the introduction of the *Daubert* approach is bound to fail. On the other hand, if these judicial bodies have the tools, through their statutes and functions, to use expert reports in a way that integrates them into the facts of the case, the inconsistent approach described in previous chapters can be doctrinally amended. If so, then the argument in the current thesis for the introduction of the *Daubert* standard in international criminal law can hold a merit.

In order to examine this question, the chapter will scan the attitudes of the international criminal courts and tribunals during the stages of the criminal process beyond the pronouncement of their judgments. This will include the sentencing phase and, for the ICC, also the reparations phase, as the inclusion of these stages is important. In essence, the sentencing decision culminates the trial and establishes the distribution of retributive justice as

required by criminal law. As well, according to the Rome Statute, the reparations phase is considered to be indispensable to the proper distribution of justice.⁸⁸⁵ The ICC has underlined this in the *Bemba* case, where the judges refused to stall the reparations procedure until Bemba's appeal was heard, as was requested by his defence.⁸⁸⁶ Discussion of the role that experts play during the reparations' phase is equally important given that Rule 97(2) of the ICC's Rules of Procedure and Evidence explicitly states that the Court can ask for the assistance of such experts in order to assess the harm sustained by the affected civilians and to provide advice on the types and forms that the awarded reparations may take.⁸⁸⁷ To the extent that the ICC has held that the harm endured by an individual in order to be termed a 'victim' may also include psychological harm,⁸⁸⁸ the inclusion of experts in the assessment of the psychological impact of certain warfare acts on civilians is an issue that is also pertinent for reparations decisions. This is because reparations are meant to serve the purpose of 'restorative'⁸⁸⁹ or 'reparative'⁸⁹⁰ justice and to complement the retributive functions

⁸⁸⁵ See Articles 75 and 79 of the ICC Statute as well as Rules 94 to 99 of the Court's Rules of Procedure and Evidence. For the fact that the reparations phase is unique to the ICC vis-à-vis the other international criminal courts and tribunals see Anne-Marie de Brouwer & Mikaela Heikkilä, *Victims Issues: Participation, Protection, Reparation and Assistance in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES*, Goran Sluiter et al. eds., Oxford University Press (2013) at 1355-1359

⁸⁸⁶ ICC, Trial Chamber III, Situation in the Central African Republic in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Defence's request to Suspend the Reparations Proceedings, 5 May 2017

⁸⁸⁷ ICC, Rules of Procedure and Evidence, Rule 97(2); FIDH, *Victims' Rights before the ICC/Chapter VII: Reparations and the Trust Fund for Victims* at 17 available at https://www.fidh.org/IMG/pdf/10-CH-VII_Reparations.pdf

⁸⁸⁸ On this see ICC, Rules of Procedure and Evidence, Rule 85 (defining victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'). See also Situation: Democratic Republic of the Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06, 11 July 2008, para.32

⁸⁸⁹ Carolyn Hoyle & Leila Ullrich, *New Court, New Justice?: The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court*, 12 J. Int'l. Crim. Justice 681,682-84 (2014) (discussing the general notion of restorative justice and the role of the ICC in the wider context); Anja Wiersing, *Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court*, Amsterdam Law Forum, VU University Amsterdam, 2012 at 24 available at <http://amsterdamlawforum.org/article/viewFile/278/459>

⁸⁹⁰ Lucia Zedner, *Reparation and Retribution: Are they Reconcilable?* 57 Modern L. Rev. 228,231 (1994); Malin Aberg, *The Reparations Regime of the International Criminal Court: Reparations or General Assistance?* at 9 available at <http://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>

accomplished by the defendant's punishment.⁸⁹¹ The inclusion of the reparations phase is also important for another reason. The ICC's interaction with experts at that stage of the proceedings demonstrates how such interaction is not only possible, it is actually more naturally underlined once the Court deals with issues which fall inside the realm of the criminal trial, yet do not call for the application of criminal law rules. Rather, issues should be seen as resembling, yet not totally mirroring the French terminology *partie-civil* arrangements in civil law countries, where victims participate in the criminal proceedings in order to claim compensation if the defendants are convicted.⁸⁹² The ability of international criminal judges to interact with experts, even in cases where the application of criminal rules is not involved, underlines the premise of the current thesis which examines the possibility of international criminal judges being aided by experts in order to assess the military commander's criminal responsibility inside a framework that is *Daubert*-inspired and resembles administrative law.

The chapter will first discuss the sentencing decisions and will then examine the ICC reparations orders. In the sentencing phase, the international criminal judges assess psychological or psychiatric findings. Although mental health experts have played a role in

⁸⁹¹ Laurel Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court* in *CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS*, Christian de Vos et al. eds., Cambridge University Press, 2015 at 304. See also the relevant statement of the ICC's former president Sang Hyun Song that 'the ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes' cited in Malini Laxminarayan, *The International Criminal Court and Victim Well-being: A Restorative Approach?* The Hague Institute for Global Justice, 17 March 2015 available at <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/commentary/the-international-criminal-court-and-victim-well-being-a-restorative-approach/>

⁸⁹² Redress: Justice for Victims; The ICC's Reparations Mandate, 20 May 2011 at 1 available at http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf; Luke Moffett, *Reparations for Victims at the International Criminal Court: A New Way Forward?* Int'l. J. Hum. Rghts. (2017) 3 (noting though the differences also between domestic and international criminal proceedings to this effect). For the fact that the ICC victim participation cannot be seen as exactly mirroring such participation in domestic criminal systems see also Binxin Zhang, *Recognizing the Limits of Victims' Participation: A Comparative Examination of the Victim Participation Schemes at the ECCC and the ICC in THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: ASSESSING THEIR CONTRIBUTION TO INTERNATIONAL CRIMINAL LAW*, Simon Meisenberg & Ignaz Stegmüller eds., TMC Asser Press (2016) at 518 (noting that before the ICC victims are not parties to the proceedings and can only intervene if the Chamber deems that their interests are affected). See also *Victim Participation at the Case Stage of Proceedings*, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, February 2009 at 2

many areas of law, for example to help judges decide whether a defendant is fit to stand trial⁸⁹³ or other reasons,⁸⁹⁴ the current chapter will focus on instances where they are needed to assess the psychological harm inflicted on the affected civilians.

The international criminal courts and tribunals whose jurisprudence will be discussed will be the same ones that the analysis in the previous chapter was based on though with the necessary adaptations. For example, tribunals such as the ICTR, discussed in previous chapters, cannot be expected to also be included in the current discussion since their reference to the mental harm caused to the affected civilians was not done in a way to demonstrate its role in the gravity of the crime and the magnitude of the imposed sentence.⁸⁹⁵ In essence, the analysis in the current chapter will focus on two international criminal bodies, namely the ICTY and the ICC. This is because only these two international judicial formations have been gripped with the question of how to evaluate civilians' psychological suffering and whether or not any psychological or psychiatric judicial assertions should be linked to firm, epistemological evidence. A discussion and assessment of the stance undertaken by international criminal judges will follow.

⁸⁹³ Ian Freckelton & Magda Karagiannakis, Case Commentary: Post-Traumatic Stress Disorder and Hospitalization Syndrome as Potential Aetiologies of Unfitness to Stand Trial: The Gbagbo Decision, 21 *Psychiatry, Psychology & Law* 645 (2014)

⁸⁹⁴ See for example ICTY, *Prosecutor v. Kunarac et als*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, para.509, note 1232 (referring to the defendant's knowledge of the trauma his actions are bound to cause as an indication that the defendant had the required mens rea at the time of the crime's commission and thus the crime can be asserted)

⁸⁹⁵ See for example ICTR, *Prosecutor v. Jean-Paul Akayesu*, supra note 733, para.143; ICTR, Appeals Chamber, *Prosecutor v. Musema*, ICTR-96-13-A, Judgment, 16 November 2001, paras. 100–101

7.2 International Criminal Judges and the Resort to Mental Health Experts in the Sentencing Phase

It is true that in their quest to adequately determine the length of the sentence before it is pronounced, during the sentencing phase, international criminal judges take into account more the testimonies and reports of mental health experts relating to the harm inflicted on the civilians testifying as witnesses, compared to what is happening during the main trial. In the sentencing phase, judges do take into account also any mental health assertions concerning the defendant. If it can be shown that this defendant suffered from mental health disorders, in particular PTSD, then international criminal courts and tribunals can declare that their diminished mental capacity at the time they committed their crimes should have an effect on the verdict and/or the imposed sentence.⁸⁹⁶

This connection between trauma and mental harm either when it comes to the defendant or the civilian victims who constitute the epicentre of this thesis, is largely discussed in the sentencing phase in the realms of sexual crimes,⁸⁹⁷ yet the aforementioned trauma-mental harm nexus can relate also to other cases, for example cases relating to the trauma that child soldiers

⁸⁹⁶ See for example ICTY, *Prosecutor v. Delalic et al.*, supra note 582, para. 1258; Saira Mohamed, Of Monsters and Men: Perpetrator Trauma and Mass Atrocity, 115 Columbia L. Rev. 1157, 1187 (2015). For the fact that such arguments are not always being crowned with success before Trial Chamber judges even when they involve invocation of PTSD see Annie O'Reilly, Affirmative Defenses in International Criminal Proceedings in THE ROLE OF THE DEFENSE IN INTERNATIONAL CRIMINAL JUSTICE (Colleen Rohan & Gentian Zyberi eds., 2017) Cambridge University Press, 498 (with further references to jurisprudence). But see also the case of Erdemovic where the ICTY Trial Chamber took into account as a sign of remorse and a mitigating factor, the fact that according to mental health experts, the defendant had suffered from what was described in the judgment 'post-traumatic shock disorder' as a result of his crimes. (ICTY, Trial Chamber, *Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, IT-96-22-T, 29 Nov.1996, para.98). See also the case of *Todorovic* where the Trial Chamber judges took into account in the sentencing phase two different testimonies of mental health experts, the one declaring that the defendant suffered from acute stress reaction and consequently from PTSD whereas the other expert did not opine likewise. Given the fact that both experts held that Todorovic did not suffer from any personality disorders the time the crimes took place, the judges decided not to acknowledge this PTSD parameter as a mitigation ground. (ICTY, Trial Chamber, *Prosecutor v. Todorovic*, IT-95-9/1-S, Sentencing Judgment, 31 July 2001, paras. 94–95)

⁸⁹⁷ On this see Farhad Malekian, supra note 6; See also ICC, Trial Chamber II, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, paras.204, 989

have experienced as a result of their violent conscription.⁸⁹⁸ On this account, civilian trauma is usually discussed as an aggravating factor in the pronouncement of the final sentence.⁸⁹⁹

This is the case given the fact that, contrary to the Statutes of international criminal tribunals such as the ICTY and the ICTR, the Rome Statute contains an explicit provision for experts to contend with the victims' psychological plight⁹⁰⁰ and the ICC has allowed psychologists to accompany civilian victims during their testimony, especially if these victims are children.⁹⁰¹ Nevertheless, even in the sentencing phase following the main trial and even if they take the civilians' mental harm into account, echoing their main trial approach international criminal courts and tribunals do not always provide a solid link between the defendant's actions and the incurred harm.⁹⁰² Yet determining the level of the incurred harm is essential also in the sentencing phase. Whereas in the main trial it related to the question whether the causation of serious mental harm could be asserted and thus an international crime could be asserted, in the sentencing phase the seriousness of the incurred harm plays a role to the gravity of the crime and the height of the sentence the defendant will receive assuming he is found guilty. For example, in *Furundizja*, it was revealed during the later stages of the trial that witness A, who had been raped and tortured, suffered from PTSD.⁹⁰³ The Trial Chamber

⁸⁹⁸ ICC, Trial Chamber II, *Prosecutor v. Germain Katanga*, *ibid*, para.1054

⁸⁹⁹ Laurel Baig, Sentencing for Sexual Violence Crimes in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (Serge Brammetz & Michelle Jarvis eds., Oxford University Press, 2016) 277 (noting that 'while it is sometimes categorized as an aggravating factor, it is better to view victim impact as an inherent component of the gravity of the crime'). Along these lines see SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, Sentencing Judgment, SCSL-04-16-T, 19 July 2007, para. 19 (with further references also to the ICTY jurisprudence). For an example of the approach according to which the victim impact is considered as an aggravating factor see ICTY, Trial Chamber, *Prosecutor v. Plavsic*, Sentencing Judgment, IT-00-39&40/1-S, 27 Feb. 2003, para. 56

⁹⁰⁰ Jean de Dieu Sikulibo, International Criminal Justice and the New Promise of Therapeutic Jurisprudence: Prospects and Challenges in conflict-related sexual violence cases in THERAPEUTIC JURISPRUDENCE AND OVERCOMING VIOLENCE AGAINST WOMEN (Debarati Halder & K. Jaishankar eds., Information Science Reference, 2017) 223

⁹⁰¹ *Ibid*

⁹⁰² ICC, Trial Chamber II, *Prosecutor v. Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, 23 May 2014, para. 61

⁹⁰³ ICTY, Trial Chamber, *Prosecutor v. Furundizja*, IT-95-17/1-T, Judgment, 10 December 1998, para.90

requested a re-evaluation of A's testimony, calling on mental health experts to assert if PTSD could indeed be diagnosed.⁹⁰⁴ With mental health experts conceding that A's behaviour pointed towards that conclusion, the Trial Chamber pronounced that she suffered from PTSD.⁹⁰⁵

The importance of the conclusion that A suffered from PTSD became more evident in the sentencing phase where the judges declared that the pronounced sentence awarded to the defendant would take into account, *inter alia*, 'the gravity of the crime'.⁹⁰⁶ The fact that witness A was viciously tortured and raped signalled to the judges that the relevant crimes had taken place in an aggravated form.⁹⁰⁷ At the same time, the judges noted that A had suffered 'great emotional trauma' as a result of the attacks.⁹⁰⁸ The judges did not proceed to make any transliteration of this 'great emotional trauma' conclusion into mental health terms and relate explicitly to the PTSD the A was diagnosed with. Yet, their reference to the concept of 'an emotional trauma' rather than to just 'mental pain and suffering', coupled with the extensive discussion and examination of expert witnesses in the oral proceedings, can lead to the conclusion that the 'great emotional trauma' expression can be seen as constituting the judges' efforts to describe in a quasi-legal language the PTSD diagnosis.

In the next subsection, the chapter will continue its analysis by discussing instances where the ICTY Furundizja approach should be seen as the norm or the exception in the way the ICTY approached mental health experts' reports beyond the trial's main phase. The analysis of the ICTY judgments will be followed by a similar analysis of the ICC practice on the issue.

⁹⁰⁴ Ibid, paras. 92,95

⁹⁰⁵ Ibid,para.101

⁹⁰⁶ Ibid, para.277

⁹⁰⁷ Ibid, para.295

⁹⁰⁸ Ibid, para.287

7.2.1 The ICTY and the Mental Health Experts' Role in the Sentencing Phase

Whereas Furundizja set an ordained way in which the ICTY seemed to deal with the need to summon mental health experts to assess the mental harm incurred to the particular civilians testifying before the judges and use these experts' opinions to discuss the extent of the incurred harm and the height of the sentence, the Tribunal's general practice reveals that the Furundija approach is not the approach that judges followed in all occasions. On the contrary, a look at the way issues of civilian mental harm and mental health experts' opinions have been approached after the main trial phase, reveals that the same inconsistent way with which the ICTY deals with the issue during the main proceedings, as analysed in chapter 2, runs also throughout the trial's sentencing phase.

For example, in *Dragomir Milosevic*, the Trial Chamber held that the psychological harm sustained by the affected civilians was an element that should be taken into account as far as the gravity of the committed crime was concerned., The Trial Chamber substantiated such harm, by repeating witness accounts of the fear they had experienced as a result of the attacks. These civilians asserted that the terror and suffering they had been subject to, had left them, inter alia, with psychological scars that had not disappeared even twelve years later and, hence, might never disappear.⁹⁰⁹ Despite the veracity of this claim and the magnitude of the suffering by civilians that the Trial Chamber may have correctly traced, by not basing these assertions on reports of mental health experts, the Trial Chamber rendered itself vulnerable to the critique articulated in chapter 2.

⁹⁰⁹ ICTY, Trial Chamber, *Prosecutor v. Dragomir Milosevic*, supra note 147, para. 993

In *Nikolic*, the defendant was brought before the ICTY to be tried for crimes of murder, torture and rape that took place in the Susica camp when he served as commander.⁹¹⁰ In coming to express the aggravating element of the defendant's crimes, the judges noted in their sentencing judgment the 'immediate and long-term effects of the conditions in the Susica camp'. As far as the psychological impact of the defendant's actions is concerned, the judgment rendered clear that these long-term effects included the trauma that the victims had experienced given that they suffered from their memories to that very day.⁹¹¹ The Trial Chamber ascribed an important role to mental health experts whose testimonies on the fact that the detention conditions experienced by Nikolic's victims could lead to the emergence of trauma, played a role in the Tribunal asserting the gravity of the committed crimes.⁹¹² The mental health experts did not relate to the question of whether the civilians testifying before the judges had suffered also from such trauma, but the inclusion of these experts to the process is a positive step from the judges' part indicating the importance they attribute to mental health experts' reports at least for the substantiation of any sentencing pronouncements.

A similar general use of expert evidence in order to buttress the extent of the trauma experienced by the victims and the resulting conclusion as to the severity of the defendant's actions, is seen in *Plavsic*. There, the Trial Chamber referred to the testimony of a psychotherapist, Mrs. Teufica Ibrahimfendic, who provided the Trial Chamber with the wider picture of the psychological scars the war had on the civilians in Bosnia.⁹¹³ This assessment was meant to reinforce the Trial Chamber's assertion that 'many of those persons who are forcibly transferred or expelled remain traumatized by their experiences, ten years after the

⁹¹⁰ ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolic*, IT-94-2-S, Sentencing Judgment, 18 Dec.2003, non-authoritative summary, I, paras. 2, 4

⁹¹¹ Ibid, at VIII, para. 47

⁹¹² ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolic*, IT-94-2-S, Sentencing Judgment, 18 Dec.2003, para.205

⁹¹³ ICTY, Trial Chamber, *Prosecutor v. Plavsic*, Sentencing Judgment, IT-00-39&40/1-S, 27 Feb. 2003, para.49

events.⁹¹⁴ In that sense, according to the judges' rationale, Plavsic's actions should be seen under an aggravating light.

At the same time, there have been also cases where the ICTY judges have concluded that trauma has been incurred to the affected civilians, yet in coming to assess the gravity of the crime, the judges deem it sufficient to assess this caused mental harm based on the testimonies of the civilian victims rather through recourse to the aid of mental health experts. For example, in determining the length of the sentence in *Bralo*, the judges took into account the long-lasting effect that Bralo's actions had on his victims.⁹¹⁵ Regarding the psychological aspects of these effects, the Trial Chamber noted the trauma that one of Bralo's detention and rape victims, Witness A, had experienced⁹¹⁶ as well as the psychological problems rampant among the family members of those murdered by the defendant⁹¹⁷ in order for the judges to conclude that 'these statements paint a picture of shattered lives and livelihoods and of tremendous ongoing pain and trauma.'⁹¹⁸ Whereas the suffering of these people is indisputable, the Tribunal should have resorted to the aid of mental health experts in order to substantiate beyond reasonable doubt its assertions on the ongoing character of the pain and the trauma or the level of the inflicted trauma in the first place. Bralo can be juxtaposed to this extent to *Zenelovic* where trauma assertions, crucial for the pronouncement of the final sentence, were made in connection to the victim's young age.⁹¹⁹

Finally, in *Vasiljevic*, after relying on the prosecution's Final Brief rather than on the assertions of mental health experts, the Trial Chamber held that the survivors of the defendant's

⁹¹⁴ Ibid

⁹¹⁵ Trial Chamber, *Prosecutor v. Bralo*, IT-95-17-S, Sentencing Judgment, 7 December 2005, para. 40

⁹¹⁶ Ibid, para.39

⁹¹⁷ Ibid, paras. 37–38

⁹¹⁸ Ibid, para.40

⁹¹⁹ On this see Inger Skjelsbaek, *The Military Perpetrator: A Narrative Analysis of Sentencing Judgments on Sexual Violence Offenders at the International Criminal Tribunal for the former Yugoslavia (ICTY)*, 3(1) J. Social & Political Psychology 46,58 (2015) (noting how in the *Zelenovic* sentencing judgment, the assertion that a psychological trauma has been caused to the victims is followed by a phrase stating the victims' young age)

crimes suffered from trauma and that this factor, among others, constituted an aggravation of the crime.⁹²⁰ Whereas regarding the affected civilians such an assertion was made with no resort to mental health experts, the Tribunal did examine and admit the evidence of mental health experts concerning the question of whether the defendant suffered from any psychiatric disorder and should, thus, be found to have diminished mental responsibility.⁹²¹ Moreover, elaborating on the evidence admissibility rule they applied, the judges clarified that they had put both the expert's relevance as well as the reliability of his or her report under scrutiny.⁹²² In that sense, the ICTY rendered clear that the parameters of the Daubert standard do not doctrinally oppose the principles and rules of international criminal justice.⁹²³

The inconsistent manner with which the ICTY resorts to mental health experts in the sentencing phase is underlined in cases where the factual background is the same. The Srebrenica genocide provides an example of this. In *Popovic*, he and his co-defendants were indicted for crimes committed in and around Srebrenica in July 1995.⁹²⁴ In the course of pronouncing the relevant sentence for the defendants who were found guilty, the Trial Chamber came to substantiate the mental harm incurred by the affected civilians by pointing out to testimonies of the civilian victims without the buttressing of any expert reports. In Paragraph 2151 of the judgment, the judges referred to the fact that 'those who survived the executions underwent extreme suffering and severe mental and physical trauma.'⁹²⁵ In order to substantiate such a conclusion, the Tribunal cited Paragraph 847 of the judgment, where such mental health

⁹²⁰ ICTY, Trial Chamber II, *Prosecutor v. Mitar Vasiljevic*, IT-98-32-T, Judgment, 29 November 2002, para.276 n.671

⁹²¹ Ibid, paras.283-293

⁹²² Ibid, para.20

⁹²³ For the amenability of the Daubert standard in the ICTR jurisprudence see for example ICTR, Trial Chamber II, *Prosecutor v. Juvenal Kajelijeli*, ICTR-98-44A-T, 1 December 2003, para.62 (the Prosecution arguing that an expert report should not be taken into account by the Tribunal because it showed no data or scientific research to authenticate its conclusions)

⁹²⁴ ICTY, Trial Chamber II, *Prosecutor v. Popovic et al.*, IT-05-88-T, 10 June 2010, para.2

⁹²⁵ Ibid, para.2151

contentions were being made by the Trial Chamber on account of the testimony provided by the civilian victims.⁹²⁶ While some of these civilians testimonies still remain confidential by order of the Trial Chamber, others have been made available for public reading. These public testimonies contain descriptions of the fear felt by the civilian victims and trauma symptoms they experienced as a result. For example, Hafiza Salihovic, a woman lost her husband and sons who during the Srebrenica genocide and became a refugee together with her daughters, described how one of these daughters could not accept what had happened to her brother and continued to cry and was not able to properly eat even one year after the event.⁹²⁷ Assuming that, together with the other cited testimonies, this part of the testimony triggered the Trial Chamber to assert that the affected civilians had suffered from trauma, the judges did not try to scientifically substantiate such a conclusion by inviting a mental health expert either to examine Hafiza's daughter and attest to her medical condition or to opine on whether the described symptoms could point to the existence of trauma.

The Trial Chamber's holding in *Popovic* can be starkly put opposite the stance the same Tribunal took in *Blagojevic*, a case also referring to the Srebrenica genocide. In *Blagojevic*, similar to in *Popovic*, the trauma experienced by the affected civilians was also considered to be an aggravating factor. Yet, the infliction of such trauma was taken into account as fact by the Tribunal through reliance on the testimony provided by a mental health expert in the realm of another case referring to the victims of Srebrenica.⁹²⁸ Whereas the fact that such expert

⁹²⁶ The fact that the testimonies belonged to civilian victims and not to experts can be easily asserted through the fact that all the cited testimonies on the issue of the trauma suffered were filed as a '92 bis statement', namely under Rule 92 bis of the Tribunal which allows a witness to file a written statement instead of testifying orally before the Court. For further information on the Rule and its integration in the ICTY system see ICTY, Trial Chamber, *Prosecutor v. Slobodan Milosevic*, Decision on Prosecution's Request to Have Written Statements admitted under Rule 92bis, 21 March 2002 available at

http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/20321AE517364.htm

⁹²⁷ ICTY, Witness Statement, Hafiza Salihovic, 17 June 2000, p.3 available at <http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Exhibit/NotIndexable/IT-95-5%2318/ACE117533R0000464958.pdf>

⁹²⁸ ICTY, Trial Chamber I, *Prosecutor v. Blagojevic*, IT-02-60-T, 17 January 2005, para. 845

testimony was given in the course of another trial and not in the realms of that concerning Blagojevic, still, resort to mental health experts for trauma incurred as a result of the Srebrenica genocide, demonstrates that such resort is not incompatible with the function of the Tribunal and could have easily taken place also in Popovic.

7.2.2 The ICC and the Mental Health Experts' Role in the Sentencing Phase

The ICC has been called to assess warfare's psychological impact in the course of a number of sentences that have been pronounced by its judges. For example, in *Lubanga*, in coming to deliberate on the length of the sentence that Thomas Lubanga Dyilo should get after being found guilty of conscription of child soldiers, the judges called Dr. Schauer as an expert witness to render her testimony on the trauma caused to the child soldiers. Dr. Schauer referred generally to her research on the trauma that child soldiers experienced as a result of their conscription⁹²⁹ both in the Democrat Republic of Congo where Lubanga's crimes took place in the relevant period and in other countries such as Uganda.⁹³⁰ The Court did not proceed to articulate explicitly how this trauma could be seen portrayed in the specific child soldiers who were victims of Lubanga. Accordingly, the Court adopted the Dr. Schauer's conclusions as a general background against which it came to see the gravity of the crime.⁹³¹

In other instances, the ICC judges did not take into account at all the opinion of mental health experts in coming to discuss the importance of warfare's psychological repercussions on the gravity of the crimes committed. Thus, in *Katanga*, the Trial Chamber relied upon the non-expert testimony of the village chief in order to assert, with no further mental health

⁹²⁹ ICC, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/06, 10 July 2012, para.39

⁹³⁰ Ibid, para. 40

⁹³¹ Ibid, para.44

evidence, that the women and men who survived being attacked still bore the trauma generated by these attacks.⁹³²

In *Bemba*, although the defendant was ultimately acquitted for allegations of crimes committed in the Central African Republic,⁹³³ the Trial Chamber which issued the initial verdict did refer to the although reference to the psychological symptoms experienced by victims of specific rape incidents was made during the verdict,⁹³⁴ in the sentencing phase, judges made use of the information that mental health experts had provided regarding the general psychological and psychiatric implications of rape on the victims⁹³⁵ to substantiate the gravity of the crimes which Bemba was found guilty of. Taking into account the references of mental health experts on the adverse impact that the act of rape has on its victims in general, the judges proceeded to subjugate this epistemological truth to the facts as proven during the oral proceedings.⁹³⁶ Thus they related, in Paragraphs 36 and 37, to the conclusions of mental health experts who had testified before the Court on the general traumatic implications of rape in order to continue the analysis by opening Paragraph 38 with the phrase ‘the victims of rape in this case....’⁹³⁷ As a result, the Trial Chamber concluded that the crimes of rape were of ‘utmost, serious gravity.’⁹³⁸

The judges made it evident that reference to mental health expertise cannot be made *in abstracto*, but rather the subjugation of the epistemological findings to the proven facts must

⁹³² ICC, Trial Chamber II, *Prosecutor v. Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, 23 May 2014, paras. 49, 57

⁹³³ ICC, Appeals Chamber, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to article 74 of the Statute’, ICC-01/05-01/08 A, 8 June 2018

⁹³⁴ ICC, Trial Chamber III, Situation in the Central African Republic in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, paras. 472, 510, 551

⁹³⁵ *Ibid.*, para. 567, n.1761

⁹³⁶ ICC, Trial Chamber III, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08, 21 June 2016, paras. 36–38

⁹³⁷ *Ibid.*

⁹³⁸ *Ibid.*, para.40

also take place. The particular ICC approach is more nuanced than that undertaken by the ICTY or the ICC in other cases. Along these lines, in the ICC jurisprudence, one notices a linear progression in the integration of mental health opinions and reports and the discussion of the psychological impact of warfare from a general, in abstracto model to a more in concreto one.

At the same time, by endorsing such an approach towards the integration of the testimonies of mental health experts in the sentencing phase, the judges adopted the stance followed by the Office of the Prosecutor in the document delineating the Prosecution's sentencing submissions in the particular case.⁹³⁹ In that particular document, the Office of the Prosecutor referred explicitly to the mental injuries of the affected civilians and to the psychological problems they experienced,⁹⁴⁰ discussing the incurred mental harm with explicit reference to PTSD and underlining that it was imperative for the ICC to make the linkage between the sustained psychological civilian harm and the particular disorder by referring extensively to the relevant PTSD symptoms the civilians reported in their testimonies.⁹⁴¹ In that sense, in the particular case, the Prosecutor undertook a holistic attitude towards civilian suffering, comprising both the linkage with certain trauma symptoms. It would be commendable if the particular approach was rendered standard practice, escorted also with psychological assessments of the suffering of the civilians testifying before the Court rather than general portrayals of the plights that the eruption of hostilities entails in a given instance defined widely by time and space.

⁹³⁹ ICC, Trial Chamber III, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of Prosecution's Sentencing Submissions, 11 April 2016, ICC-01/05-01/08-3363-Conf, ICC-01/05-01/08, 15 April 2016

⁹⁴⁰ Ibid, paras.46 &49

⁹⁴¹ Ibid, para.47

7.3 The ICC and the Resort to Mental Health Experts in the Reparations Orders

The ICC demonstrates partly an intention to engage more with mental health experts' reports. However, in other instances, the ICC's approach tends to be similar to that undertaken by international criminal tribunals, as discussed in the previous section as well as in chapter 2.

For example, in *Lubanga*, the Trial Chamber noted that the sustained harm from Lubanga's crimes for which he was held guilty had to be assessed on a case to case basis for each affected civilian⁹⁴² and proceeded to delineate a certain procedure that had to be followed to do so. Being divided into relevant steps, such a procedure encompassed, inter alia, the invitation of experts who were able to epistemologically assess the civilian harm.⁹⁴³ These assertions regarding the need for the sustained harm to be documented on an individual basis through recourse to experts, including mental health experts, was equally shared by other factors involved in the reparations phase, such as the Victims' Trust Fund,⁹⁴⁴ which resorted to the aid of an NGO in order to provide the Trial Chamber with details of the collective reparations programmes.⁹⁴⁵ This NGO, in turn, enlisted the services of three medical experts, among them a clinical psychologist, in order to record the psychological harm that had been incurred to the affected civilians.⁹⁴⁶

At the same time, reference to mental health experts is not rigorously undertaken by the Court itself. Echoing its aforementioned approach in the sentencing judgment, the Court

⁹⁴² ICC, Trial Chamber I, Situation: Democratic Republic of the Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be applied to reparations, ICC-01/04-01/06, 7 August 2012, para. 228

⁹⁴³ Ibid, para.282

⁹⁴⁴ On the general role of the Trust Fund in the reparations procedure see ICC, Rules of Procedure and Evidence, Rule 98; FIDH, Victims' Rights before the ICC/Chapter VII: Reparations and the Trust Fund for Victims at 4,28 available at https://www.fidh.org/IMG/pdf/10-CH-VII_Reparations.pdf

⁹⁴⁵ The Trust Fund for Victims, Public document: First submission of victim dossiers with twelve confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V01 only, ICC, Trial Chamber II, Situation: Democratic Republic of the Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 31 May 2016, paras.13,40

⁹⁴⁶ Ibid, para.13

proceeded to adopt the expert witness' general conclusions on trauma and child soldiers and did not request any further subjugation to the facts of the particular case. Ultimately, Dr. Schauer's conclusions on the effect of trauma on child soldiers were used by the Court as the epistemological basis for the judges to conclude that these child soldiers who were victims of conscription by Lubanga equally suffered from psychological trauma and the development of psychological disorders such as suicidal tendencies, depression, and dissociative behaviour.⁹⁴⁷

The legacy of the *Lubanga* reparations order is evident in *Katanga*. Katanga's defence team stressed thus how the ICC judges, following the pronouncement of the Appeals Chamber in *Lubanga*, should specify the type of reparations ordered and should provide an explicit link between the actions of the defendant and the harm that was incurred to the affected civilians.⁹⁴⁸

Along these lines, the Trial Chamber in *Katanga* followed this rationale in coming to discuss explicitly in its reparations' decisions how the crimes for which Katanga was convicted had caused harm to the civilians. At the same time, the *Katanga* reparations decision seems to part ways from the *Lubanga* one to the extent that recourse to mental health witnesses is made in order for the Court to shape its judgment regarding the psychological harm that civilians have sustained.

On the one hand, the ICC, citing its Rules of Procedure and Evidence, acknowledged in the *Katanga* reparations order that in order to award reparations, it first had to assess the harm sustained by the affected civilians. Along these lines, and citing its practice in the *Lubanga* reparations decision, the Court noted that such harm could be assessed through the

⁹⁴⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the 'Decision Establishing the principles and procedures to be applied to reparations' of 7 August 2012, ICC-01/04-01/06 A A 2 A 3, March 3, 2015, para.191

⁹⁴⁸ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the *Prosecutor v. Germain Katanga*, Defence Response to the Propositions des victimes sur des modalites des reparations dans la presente affaire, ICC-01/04-01/07, 30 December 2016, para. 3

aid of experts.⁹⁴⁹ In fact, NGOs and other bodies, such as the Queens University Law Faculty experts who filed briefs before the Court in light of its reparations decision, stressed how recourse to experts, particularly when it came to the mental harm incurred, should be sanctioned by the Court as the way go. The reliance of the Court on expert opinions and reports pervades the question of the need to establish the suffered harm and encompasses, in the view of parties engaged in the proceedings, for example Katanga's defence team, also the question of the types of reparations and the need for psychological support during the reparations stage as experts had suggested.⁹⁵⁰

It is also interesting to note that, in some instances, for example in assessing whether the affected civilians had suffered from transgenerational trauma, the ICC Trial Chamber based its affirmations on the discussion of provided expert reports.⁹⁵¹ In the case of the Bogoro attack for which the defendant was convicted and which resulted into psychological harm for the affected civilians, the Trial Chamber examined whether the victims could also claim reparations on the basis of the transgenerational harm that was sustained. This is because the children who would be born to these victims would bear a trauma. Yet, despite the fact that the provided expert opinion referred to the psychological trauma present in many children whose parents had experienced the attack in Bogoro,⁹⁵² the Trial Chamber decided not to endorse the expert report as far as the creation of transgenerational trauma was concerned, as no evidence was presented 'to establish on a balance of probabilities the causal nexus between

⁹⁴⁹ Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to article 75 of the Statute, ICC-01/04-01/07, 24 March 2017, para. 31 n.57 (the Court noting that the Chamber may avail itself of experts according to Rule 97(2) of the Rules of Procedure and Evidence)

⁹⁵⁰ Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the *Prosecutor v. Germain Katanga*, Defence Response to the Propositions des victimes sur des modalites des reparations dans la presente affaire, ICC-01/04-01/07, 30 December 2016, para. 4

⁹⁵¹ Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, supra note 950, para. 132

⁹⁵² Ibid, para.133

the trauma suffered and the attack on Bogoro.⁹⁵³ Similarly, contrary to the practice of the ICTY and of the ICC in the sentencing phase regarding the connection between the vulnerability of certain victims and the gravity of the crime, the gravity that the Trial Chamber attributed to the crime of child conscription undertaken by the defendant in *Katanga* is buttressed in the reparations decision through reference to the expert witness' testimony before the Court that characterized child soldiers as a vulnerable group.⁹⁵⁴

On the other hand, there are instances, for example in determining the question of whether the affected civilians had sustained psychological harm from the Bogoro attack, where the ICC judges preferred to be led to their conclusions with no reference to the opinions and reports of mental health experts. The Trial Chamber acknowledged that the civilians affected by the defendant's attacks could have suffered psychological harm. Such harm should be categorized, according to the Court, as two forms, namely indirect harm caused by the loss of family members and loved ones and direct harm experienced due to an attack. Relying on the balance of probabilities, the Court assumed that the surviving civilians had sustained indirect psychological harm due to the loss of family members, irrespective of whether such family member was a near or a distant relative.⁹⁵⁵

As far as the direct psychological harm, the Court applied an assessment based on both the surviving civilians' testimonies and on mental health expert certificates that described the harm a particular civilian had sustained.⁹⁵⁶ Nevertheless, despite the existence of mental health

⁹⁵³ Ibid, para.134

⁹⁵⁴ Ibid, para. 157,n.242. For the fact that the Trial Chamber demonstrated in *Katanga* an acknowledgment of the views of experts on certain issues going beyond the assertion of harm, see ibid, para. 274,n.389, para. 278

⁹⁵⁵ Ibid, paras. 121–122. On the problematic character of such a reliance see also the objections raised by Katanga's Defence team at Trial Chamber II, Situation in the Democratic Republic of Congo in the case of the *Prosecutor v. Germain Katanga*, Defence Response to the Propositions des victimes sur des modalités des réparations dans la présente affaire, ICC-01/04-01/07, 30 December 2016, para. 15

⁹⁵⁶ Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, supra note 950 at paras. 129–130

certificates, the Court decided that psychological harm should be assessed as asserted by the relevant civilians who had witnessed the attack in Bogoro. In the Court's words,

‘the Chamber regards the fact alone of having been in Bogoro on 24 February 2003 during the attack and of having seen or fled the massacres and atrocities perpetrated had major ramifications for the mental health of the persons present that day.’

Furthermore, following the findings in the sentencing judgment as discussed above, in the reparations' decision, the Trial Chamber reiterated the relevant paragraphs of the sentencing judgment which, based on the testimony of the village chief, refer to the trauma suffered by the affected civilians.⁹⁵⁷

Interestingly, an ever further legalistic approach is taken by the ICC in cases where the potential psychological impact on civilians is not created through acts of warfare such as those acts examined in the current thesis but rather which refer to the destruction of monuments, buildings and objects of cultural significance. In *Al Mahdi*, in ordering reparations for the community of Timbuktu based, inter alia, on the destruction of cultural monuments for which the defendant was found guilty, the ICC referred to the ‘moral harm’ the people of Timbuktu had suffered and the sentiments of humiliation and suffering they had experienced.⁹⁵⁸ This moral harm is seen as encompassing death, personal injury, and loss of liberty, with mental harm and suffering being one subcategory of moral harm.⁹⁵⁹ Along these lines, the ICC appointed experts to assess the mental harm sustained by the civilians due to the destruction of the cultural monuments. Yet, unlike the Court's approach in *Lubanga* and *Katanga*, such

⁹⁵⁷ Ibid, para.124

⁹⁵⁸ ICC, Trial Chamber VIII, Situation in the Republic of Mali, *Prosecutor v. Ahmad al Faqi al Mahdi*, ICC-01/12-01/15, 17 August 2017, para. 87

⁹⁵⁹ Annex II, Expert Report-Reparations Phase, the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Dr. Marina Lostal, 28 April 2017 (amended on 3 May 2017), paras.51,65 available at https://www.icc-cpi.int/RelatedRecords/CR2017_04901.PDF

mental harm is discussed and assessed in *Al Mahdi* through international law experts rather than through assumptions based on the affected civilians' testimonies or the opinions of mental health experts.⁹⁶⁰ Thus, in *Al Mahdi*, the whole analysis of the mental harm of the civilians is done using a human rights legalistic framework rather than using mental health sciences precepts.⁹⁶¹ Nevertheless, as it has been argued, the *Al Mahdi* ICC analysis could well have followed the stance the Court took in *Katanga* as far as psychological harm is concerned.⁹⁶² In *Al Mahdi*, where the crimes referred to the destruction of cultural monuments rather than the death of family members, it would be difficult to establish mental harm based on the indirect psychological harm the affected civilians would have experienced. Still, such psychological harm as the same as the indirect harm the affected civilians had experienced, yet to the extent that the *Al Mahdi* case also referred to the direct psychological harm sustained by civilians due to their being present and experiencing an attack, there is no reason that the Court could not have resorted to the rationale followed in the *Katanga* reparations decision and order reparations for these civilians.

⁹⁶⁰ See for example the two separate expert testimonies provided by the international law experts Marina Lostal and discussing inter alia the issue of the mental harm the civilians have suffered at Annex II, Expert Report-Reparations Phase, the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Dr. Marina Lostal, 28 April 2017 (amended on 3 May 2017) available at https://www.icc-cpi.int/RelatedRecords/CR2017_04901.PDF; Brief by Mrs. Karima Bennoune, UN Special Rapporteur in the Field of Cultural Rights, Expert appointed by the International Criminal Court in the case of the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Reparations phase, 27 April 2017, available at https://www.icc-cpi.int/RelatedRecords/CR2017_05022.pdf

⁹⁶¹ See for example Annex II, Expert Report-Reparations Phase, the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Dr. Marina Lostal, 28 April 2017 (amended on 3 May 2017), para. 62 available at https://www.icc-cpi.int/RelatedRecords/CR2017_04901.PDF (referring to judgments of the Inter-American Court of Human Rights); Brief by Mrs. Karima Bennoune, UN Special Rapporteur in the Field of Cultural Rights, Expert appointed by the International Criminal Court in the case of the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Reparations phase, 27 April 2017 at 29 available at https://www.icc-cpi.int/RelatedRecords/CR2017_05022.pdf (referring to the humiliation the civilians have suffered as a form of infringement of their human rights and concluding that as a result the destruction of cultural sites may have constituted cruel, inhumane or degrading treatment for these civilians). It has to be noted though that such human rights framework is present even in the *Katanga* reparations decision, yet it is more stressed in *Al Mahdi*. On this see Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, supra note 950, paras. 127–128

⁹⁶² Alexandra Harrington, ICC Reparations post-Katanga-Part 2, 19 April 2017 available at <https://ilg2.org/2017/04/19/icc-reparations-post-katanga-part-2/>

In *Bemba*, while no reparations were ultimately awarded to the victims due to the defendant's acquittal,⁹⁶³ the ICC had initially proceeded with the issue and had appointed even experts to assess the height these reparations should attain.⁹⁶⁴ The process included experts assessing the harm incurred to the affected civilians.⁹⁶⁵ While the professional affiliations of the appointed experts were kept confidential, since, as noted, the Trial Chamber acknowledged in its verdict the psychological suffering Bemba's victims had endured on account of being subject to rapes,⁹⁶⁶ it is plausible to assume that mental health experts participated in the reparations process.

Indeed, in their joint report submitted in November 2017, these experts-albeit their identity and affiliations remained hidden from the public eye-discussed also the mental harm the victims sustained. The experts discussed first the fact that according to international courts such as the ICC or the Inter-American Court of Human Rights psychological harm can be one form of harm civilians can suffer.⁹⁶⁷ Interestingly, these experts proceeded to rely on publications of the American Psychological Association and the American Psychiatric Association and on the mental health sciences literature in coming to further link the psychological civilian harm to psychiatric disorders such as PTSD, depression and generalized anxiety. Moreover, the experts went further in the mental health sciences analysis and

⁹⁶³ ICC, Trial Chamber III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Final Decision on the Reparations Proceedings, ICC-01/05-01/08, 3 August 2018, para.3

⁹⁶⁴ ICC, Annex, Public Redacted Version of Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2, Expert Report on Reparation Presented to Trial Chamber III, International Criminal Court, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, The Hague, 20 November 2017, paras.54-56

⁹⁶⁵ ICC, Trial Chamber III, Situation in the Central African Republic in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Defence's request to Suspend the Reparations Proceedings, 5 May 2017, para. 7

⁹⁶⁶ ICC, Trial Chamber III, Situation in the Central African Republic in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, paras. 472, 510, 551

⁹⁶⁷ ICC, Annex, Public Redacted Version of Annex, 28 November 2017, *supra* note 965

encompassed in their analysis also Post-Trauma Adaptational Styles in cases civilians may feel anguish yet not to a degree to demonstrate a mental health symptomatology or illness.⁹⁶⁸

Whereas the experts did relate to how reparations do not need to address the psychological harm incurred to each particular individual, they further substantiated claims of such harm by addressing its relevance *in concreto* to the particular civilians they interviewed who were affected by the crimes of pillage, murder and rape for which Bemba was indicted.⁹⁶⁹ For example as far as the psychological harm caused by rape is concerned, the experts noted how the findings of a study conducted in the United States seemed consistent with what the experts had seen in the Central African Republic.⁹⁷⁰ In that sense also in the reparations case, along the mode argued in the thesis, discussion of the civilian mental harm ceases to be just an abstract intellectual analysis but through social sciences techniques such as qualitative research (interviews)⁹⁷¹ turns to the psychological status of the civilians particularly affected by the acts for which Bemba was incriminated.

7.4 Discussing the examined ICTY and ICC judgments

The sentencing judgments and reparations orders that were examined demonstrate that international criminal courts and tribunals take into account the psychological harm civilians have sustained as a result of the defendant's crimes undertaken in the course of warfare. In many instances, such psychological harm is explicitly related in the relevant analysis to the emergence of trauma in the affected civilians. This reference to the concept of 'trauma' that both the ICTY and the ICC systematically undertake is equally important. As noted, not all

⁹⁶⁸ Ibid, para.58

⁹⁶⁹ Ibid at paras.72,83,116

⁹⁷⁰ Ibid at para.113

⁹⁷¹ Reference to these interviews takes place throughout the experts' report in Bemba. On this see indicatively ICC, Annex, Public Redacted Version of Annex, 28 November 2017, *supra* note 965, para.76

victims experience trauma, but it can be said that all those that do, can be considered as victims.⁹⁷² In that sense, the connection between trauma and civilian mental harm serves international criminal courts and tribunals to further emphasize the tight correlation between mental harm and victimhood, thus bolstering the gravity of their sentencing pronouncements.

Moreover, while initially trauma is not considered as part of certain forms of distress and mental health disorders, the ICC judgments, in particular, seem to establish a certain pattern where PTSD is increasingly portrayed as manifestation of the experienced trauma. Occasionally, this is depicted in the reports of the experts themselves. For example, in *Lubanga*, Dr. Schauer precisely referred to the fact that the child soldiers she had seen suffered not just generally from trauma, but specifically from PTSD.⁹⁷³ Yet, despite the fact that through the aid of mental health scientists, international criminal courts and tribunals could specify more their analysis on the mental harm experienced by civilians exposed to warfare, international judges prefer to largely refer to ‘mental harm’ or to the ‘psychological suffering’ of these civilians running the risk for their assertions to be rejected as arbitrary and as not scientifically robust.

Another issue that is rendered evident through the comparison between the ICTY and the ICC approach to expert testimonies, relates to the fact that whereas the ICTY does not in principle rely on them when it comes to assess the gravity of a crime, the ICC has in certain cases required that mental health experts assess the psychological harm sustained by the specific civilians in question. For example, in its sentencing decision in *Katanga*, the Court seems to follow an ICTY-related approach and does not include opinions of mental health experts at all in the discussion on the incurred psychological harm upon the affected civilians.

⁹⁷² Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 Columbia L. Rev. 1157, 1173 (2015)

⁹⁷³ ICC, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, 10 July 2012, para. 40

Nevertheless, in other instances, such as the reparations order in *Lubanga*, the ICC takes a different stance towards the involvement of expert evidence in the assessment of the harm incurred to civilians. In this case, as noted, the ICC requires that these experts depict the specific harm that each particular civilian has sustained in concreto in their reports instead of merely demonstrating in general terms that the affected civilians have suffered from a certain type of harm.⁹⁷⁴

At the same time, the ICC sentencing approach in *Bemba* is equally more nuanced and needs to be read in conjunction with the Court's approach in *Al Mahdi*. In the latter case, although legal experts were called to comment upon the mental harm suffered by the affected civilians rather than mental health experts, still, the ICC judges were keen on following a Daubert-style rationale by underlining the objectives undertaken by the experts' research as well as the methodology followed.⁹⁷⁵ Along these lines, in 2017, the ICC's sentencing approach in *Bemba* left room for talking about a potential linear evolution of the international criminal jurisprudence from a general, *in abstracto* model to a more *in concreto* one as far as international criminal justice and the discussion of mental health expert opinions are concerned.

Furthermore, the engagement of the ICC with experts for reparations cases holds significance for the current thesis because it proves, as stated above, that recourse to expert testimonies can take place in the course of a criminal trial once judges engage with law beyond the criminal law scheme. It is also significant because such judicial dialogue with experts takes place not only in the ICC, an international court, but also in the ECCC,⁹⁷⁶ a supranational,

⁹⁷⁴ For the fact that such an *in concreto* approach, requiring the ICC to assess harm specifically for the purposes of reparation, juxtaposed to the fact that the sustained harm is more generally proclaimed in the judgment, might lead to the need according to some scholars for separate 'Reparations Chambers' to be established, see Carsten Stahn, *Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation*, EJIL!Talk, 7 April 2015, available at <https://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/>

⁹⁷⁵ On this see Annex III, Public redacted, ICC-01/12-01/15-214-AnxIII-Red2, 4 August 2017, Rapport redigé par un collège d' Experts, p.p.6-8 available at https://www.icc-cpi.int/RelatedRecords/CR2017_04902.PDF

⁹⁷⁶ Sarah Williams & Emma Palmer, *Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia*, 10 Int'l. J. Transitional Justice 311, 325 (2016)

‘internationalized criminal court.’⁹⁷⁷ On this account, the marked reluctance of the ICC judges to resort to the aid of mental health experts in all cases should not be read as a structural, inherent inability embedded in international criminal law.

It is true that psychological and psychiatric opinions and reports serve a different function in the stages following the main trial, where the harm inflicted to the affected civilian or civilians is often calculated through resort to presumptions and probabilities schemes. The Rome Statute itself does not specify the relevant standard that is needed in order for reparations to be awarded.⁹⁷⁸ Accordingly, the ICC has held that, at the reparations phase, the standard of proof is more flexible than in the course of the proceedings.⁹⁷⁹ Thus, facts do not need to be established ‘beyond reasonable doubt’ as in the phase of the main trial. The reason is that victims often find it difficult to prove the harm they have sustained. If the evidence threshold was equally set to the ‘beyond reasonable doubt’ level also at the reparations phase, civilians would find it difficult to be compensated for their suffering. This less stringent standard of proof in the reparations phase, is mirrored in the Court’s view that its role in the particular phase should be seen as lying beyond the precepts of criminal law.⁹⁸⁰ Against this background, the Trial Chamber has noted that the reparations phase bears resemblance to similar procedures before international human rights law bodies, such as the Inter-American Court of Human

⁹⁷⁷ On this, see how the Chambers are described as an ‘internationalized criminal court’ in Guidebook for Judicial Reparations in Case 002/02 before the ECCC, Civil Party Lead Co-Lawyers’ section, ECCC, 13 November 2014 available at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2015-07-17%2017:01/E352.3_EN.PDF

⁹⁷⁸ FIDH, Victims’ Rights before the ICC/Chapter VII: Reparations and the Trust Fund for Victims, p.p. 15–16 available at https://www.fidh.org/IMG/pdf/10-CH-VII_Reparations.pdf

⁹⁷⁹ Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, supra note 950, paras. 59–60

⁹⁸⁰ Along this vein, see the implied criticism of this stance, posed by the Legal Representative of the Victims in the *Katanga* reparations case, through his note, stressing the Court’s criminal character, that ‘the Court is not a State, an association or an NGO: it is a criminal jurisdiction which can order reparations.’ (La Chambre de Première Instance II, Situation en République Démocratique du Congo, Affaire Le Procureur c. Germain Katanga, Public, avec Annexe 1 publique, Propositions des victimes sur des modalités de réparation dans la présente affaire (Article 75 du Statut et norme 38-1-f du Règlement de la Cour) ICC-01/04-01/07, 8 December 2016, para. 87)

Rights⁹⁸¹ where presumptions are used in order for the magnitude of the incurred harm to be assessed.⁹⁸²

Yet, as demonstrated in *Bemba* and the experts' report there, even in the reparations phase any discussion of the incurred mental harm on civilians cannot be done detached from the terminology provided by mental health sciences. Explicit reference to PTSD, depression or other psychiatric disorders comes to enrich the judge's discussion of the psychological harm suffered conviction that mental harm has been caused to the affected civilians. In that sense the 'balance of probabilities' test in the reparations' phase does not mean that resort to psychological and psychiatric opinions and reports is left with no purpose, albeit as mentioned in chapter 1, the role these reports come to play in bolstering the state of victimhood is different from the one they perform during the main trial where the defendant's innocence or guilt is still at stake.

7.5 Conclusion

When considering the findings of chapter 2 and the inconsistent stance of international criminal courts and tribunals concerning the integration of mental health expert testimonies in the judicial findings, one wonders whether this is due to an inherent structural defect in the way these judicial bodies approach such evidence or due to other reasons. The current chapter proceeded to record if international criminal judges take into account such expert input during the phases following the verdict focusing on both the sentencing pronouncement phase and the reparation orders issued by the ICC. The analysis of the relevant judgments and orders showed

⁹⁸¹ Trial Chamber II, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, supra note 909, para. 61

⁹⁸² Ibid, para.57

that, in some cases, international criminal judges dealt with mental health issues in the same way that they did during the phase of the verdict, that being either not at all or with general statements that were not necessarily connected to the psychological plight of the particular victims. At the same time, the analysis equally revealed a tendency, especially with regards to the ICC reparations orders, for the ICC to resort to mental health experts in order to substantiate, *in concreto*, the mental harm caused to the affected civilians.

This tendency on the ICC's part is important given the Court's principal role in the distribution of international criminal justice.⁹⁸³ It underlines the fact that, in essence, international criminal justice can accommodate the holdings of experts from scientific fields other than law in its pronouncements, particularly in procedures which are not strictly governed by criminal law.

The fact that even in the reparations' phase where the mental harm incurred to civilians does not have to be exactly assessed, international criminal courts and tribunals do take into account the reports of mental health experts, underlines how much more this should be the case in the course of the main trial where the exact level and degree of the incurred harm is part of the question whether an international crime has been committed.

⁹⁸³ In this framework see also the remarks of Bantekas that 'No judge is expected to follow scientific developments or obliged to infuse law with science. Rather, in their dispensation of justice, judges must (in theory) be open to all those factors that serve justice in the best possible way. Hence, they must invite, rather than oppose, expert opinions on matters that affect the type of human conduct they are determining....', proposing along these lines that a scientific entity is established which *inter alia* will provide epistemological awareness to judges on non-legal notions and mentioning PTSD in the case of soldiers as an example. (Ilias Bantekas, Introduction: An Interdisciplinary Criminology of International Criminal Law in *CRIMINOLOGICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW*, Ilias Bantekas & Emmanouela Mylonaki eds. (2014) Cambridge University Press, 4

Chapter 8: *Conclusion*

In June 2017, in a speech before an audience in Sarajevo, the ICTY president, Carmel Agius, spoke about the end of the Tribunal's work, making a short assessment of the things it had achieved. 'We offered truth' he stated, 'not reconciliation.'⁹⁸⁴ Indeed, the ICTY and, in this respect, the other international criminal tribunals and courts that have been later instituted, have offered truth. However, as the current thesis has argued, when it comes to issues pertaining to the psychological toll warfare exerted on the civilian victims, that truth could be better served if it was escorted by scientific opinions and reports. So far, international criminal courts and tribunals have built a narrative in relating to such psychological suffering. Nonetheless it is not one that is legally rigid enough to withstand any criticism that it does not comply with criminal law's demand for the culprit's acts to be specifically described in order for his or her behaviour to be penalized.

This thesis has argued that the introduction of the *Daubert* standard can lead to a more rigorous assessment of warfare's psychological impact by international criminal courts and tribunals. On these grounds, the thesis demonstrated how this is feasible based on the general functions general principles have in international criminal law (Chapter 3) and the fact that when it comes to matters of expertise, *Daubert* introduces a certain mode of reliable assessment whose precepts can be found in many jurisdictions around the globe (see Chapters 5 and 6). At the same time, I demonstrated how the adoption of *Daubert* in international criminal law is not only feasible but also necessary taking into account the way international criminal courts and

⁹⁸⁴ Hague Tribunal President: 'We offered Truth, not Reconciliation', Balkan Transitional Justice, 21 June 2017 available at <http://www.balkaninsight.com/en/article/hague-tribunal-president-we-offered-truth-not-reconciliation--06-21-2017>

tribunals have related so far to issues of psychological harm sustained by civilians (see Chapter 2). Moreover, such a mode of assessment of warfare's psychological impact on civilians would not be inherently against the current structure of international criminal proceedings, given the fact that the ICC in particular has incorporated ad hoc opinions of mental health experts in the realm of the sentencing phase (see Chapter 7).

8.1 Ramifications for Future Research

The thesis has already made an important contribution by showing that it is necessary for international criminal judges to take psychological and psychiatric reports into account not only when they are deciding on factual issues pertaining to the psychological suffering of civilians but also when they assess another organ's exercise of discretion and there is already a way provided in law beyond the domestic realm for this assessment to take place. Still, the aforementioned conclusion gives rise to additional connected questions which have not been addressed in this thesis and that can be the subject of future research.

First, the thesis comes to postulate its normative Daubert standard application argument in the context of warfare. Accordingly, it assumes that an armed conflict, either of international or non-international character, is in place and that the laws of war apply. Yet, psychological harm can also be seen under the lens of international human rights law to the extent that the particular field applies concurrently with the laws of war.⁹⁸⁵ Along these lines, psychological harm can also be addressed through human rights law as a violation of a person's right to mental

⁹⁸⁵ On this see characteristically the classical piece of Theodor Meron, *The Humanization of Humanitarian Law*, 94 *Am. J. Int'l. L.* 239 (2000). The exact relationship of the two fields has been contested by some, while other authors have pinpointed challenges that such an application of human rights law brings forth. On this see Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 *Int'l. Rev. Red Cross* 737 (2005)

health.⁹⁸⁶ The thesis has not addressed the question of whether the parallel application of human rights law in warfare could mean that any issues of mental harm could be pursued also in international courts beyond the confines of criminal law, for example before regional human rights courts, such as the European Court of Human Rights or the Inter-American Court and whether in this case, the applicants could claim along a Daubert standard mode, that the judges of these respective courts would be obliged to assess the incurred mental harm only through reliance on mental health experts' opinions. On a similar human rights tone, the thesis has equally not examined how the civilians' right to mental health can be violated and whether this right should be deemed as having a minimum threshold beyond which any violation can be deemed to be automatically 'serious'.

The thesis has argued for the introduction of the Daubert standard in international law as far as international criminal law is concerned. Yet, in domestic jurisdictions, the Daubert standard applies as an evidence assessment mode also in civil matters. The thesis has left for future research the question of whether the Daubert standard could apply when the ICJ comes to assess expert evidence as mentioned in Chapter 1. Consequently, the thesis has not also explored what the implications of such an application would be for the question of whether international law should be seen as a separate field of law or just the transposition of domestic principles on a transnational level.

Finally, Chapter 7 describes that while making sentencing decisions, the tendency is for ICC judges, in particular, to discuss the psychological impact of warfare on civilians. This is done by referring to specific mental health experts' opinions and reports provided ad hoc. As well, the judges are investigating the emergence of trauma among civilians with PTSD. Yet, the question of why Courts have focused specifically on PTSD when discussing civilian trauma

⁹⁸⁶ On this see Solon Solomon, *supra* note 253

and not on any other disorder that can manifest trauma, such as depression, has not been fully explored in this thesis.⁹⁸⁷ In that sense, I left for future discussion the question of whether PTSD should be seen as the psychiatric disorder largely associated with the discussion before courts of the mental harm stemming from the civilians' exposure to hostilities.⁹⁸⁸

8.2 Addressing the Gap in Warfare's Psychological Assessment: From the 'Internationalization' of the Daubert Standard to the Entrenchment of Consistency in International Criminal Law Jurisprudence

The current thesis demonstrated that the way international criminal courts and tribunals assess warfare's psychological impact can be changed and can become more epistemologically articulate. This can occur through both the introduction of the Daubert standard and the need for judges to use psychological or psychiatric opinions and reports when discussing the mental harm incurred to specific individuals. On these grounds, the thesis makes the following contributions:

In our globalized, international law is in constant dialogue with national legal orders. Writers speak about the internationalization of domestic law or the nationalization of international law.⁹⁸⁹ Yet, to the extent that globalization pulls the strings towards a more internationalized way of living and for more exposure of the individual to experiences beyond the national frontiers, it is evident that from this interplay, the loser is domestic law. As

⁹⁸⁷ R. Srinivasa Murthy & Rashmi Lakshminarayana, Mental Health Consequences of War: A Brief Review of Research Findings, 5(1) World Psychiatry 25 (2006)

⁹⁸⁸ On this account see the fact that on account of the Tokyo Air Raids which were conducted in May 1945 by the U.S., the Japanese courts have refused to award damages to the victims despite the latter citing their suffering from PTSD as a result of their exposure to these attacks. On this see Cary Karacas, Fire Bombings and Forgotten Civilians: The Lawsuit Seeking Compensation for Victims of the Tokyo Air Raids, The Asia-Pacific Journal: Japan Focus available at <http://japanfocus.org/-Cary-Karacas/3474/article.html>

⁹⁸⁹ David Fidler, Introduction: The Rule of Law in the Era of Globalization Symposium, 6 Indiana J. Global L. Studies 421,422 (1999) (citing Kanishka Jayasuriya)

noted,⁹⁹⁰ domestic law has lost its omnipotent power and is nowadays largely supplemented by international law. In this sense, the thesis attempts to redefine the role that domestic principles can play beyond the strict confines of the national legal orders and the influence they can exert on current international arrangements and practices like the assessment modes international criminal courts and tribunals follow.

At the same time, in an era where international institutions are being treated with suspicion, the thesis offers a way for domestic law to provide tools that can underline the rigorous legal analysis that must be undertaken by international courts. Therefore, by nurturing international law in general and international criminal law in particular, the thesis aspires, through its call for the application of the Daubert standard, to augment the validity and, ultimately, the credibility of international criminal courts as judicial institutions. As noted by none other than Benjamin Ferencz, one of the Prosecutors in Nuremberg, ‘there can be no peace without justice, no justice without law and no meaningful law without a court to decide what is just and lawful under any given circumstance.’⁹⁹¹ It is this notion of justice that the thesis comes to reinforce.

Moreover, the question of whether or not the Daubert standard can apply in international criminal law and under which conditions, is treated in this thesis as an issue utterly related to the protection of the human rights both of the civilian victims as well as defendants. The need for judges to relate to civilians’ suffering only through reference to psychological and psychiatric opinions provided ad hoc for the particular civilian victims whose testimonies constitute the basis for the defendant's conviction assures the victims’ rights. This is because, once supported by expert opinions and reports, any legal pronouncement cannot be easily

⁹⁹⁰ Milena Sterio, *The Evolution of International Law*, 31 B.C. Int’l. & Comp. L. Rev. 213,214 (2008)

⁹⁹¹ Benjamin Ferencz, *AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS*, Oceana Publications (1980) 30, 31

attacked as arbitrary and refuted in the course of an appeals review. At the same time, the rights of defendants are equally protected to the extent that they know that they were convicted for the causation of mental harm based on provided expert opinions and not on the impression that the description of the events left to the judges' emotional world.

In sum, the current thesis offers a methodological path for the assessment of warfare's psychological impact by courts and tribunals. Only time will tell if this proposed path will be eventually followed by judges themselves. For this to happen, judges will first and foremost have to liberate themselves from constraints and open a dialogue with other scientific fields, such as psychology or psychiatry, on a much wider basis. The current thesis has at least demonstrated that this is not only necessary, but also possible.

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